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No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

MICHAEL LAURITZEN and
MARILYN LAURITZEN, Individually and doing business as LAURITZEN FARMS,

Petitioners,

vs.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

I. WAS THE QUESTION OF WHETHER MIGRANT HARVESTERS WERE EMPLOYEES FOR PURPOSES OF THE FAIR LABOR STANDARDS ACT OF 1938 A QUESTION APPROPRIATE, UNDER APPLICABLE PRINCIPLES OF LAW, FOR RESOLUTION BY SUMMARY JUDGMENT.

II. DID THE DISTRICT COURT AND THE COURT OF APPEALS MISCONCEIVE, MISCONSTRUE AND MISAPPLY APPLICABLE LEGAL PRECEPTS IN ADJUDGING THAT MIGRANT HARVESTERS WERE EMPLOYEES FOR PURPOSES OF THE FAIR LABOR STANDARDS ACT OF 1938.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners **MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITZEN FARMS**, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered herein on December 15, 1987, Petition for Rehearing and Suggestion for Rehearing in Banc being denied February 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the several decisions of the District Court for the Eastern District of Wisconsin, is reported as *Sec'y of Labor. U. S. Dept. of Labor v Lauritzen,* 835 F2d 1529 (7th Cir 1987), and appears in the Appendix hereto at page 3a, together with the separate judgment of the court dated December 15, 1987, which appears at page 2a of the Appendix. The opinion of the District Court, dated December 20, 1985, and captioned *Brock v Lauritzen,* is reported at 624 F Supp 966 (ED Wis 1985). The opinion of the District Court dated September 30, 1986, is reported as *Brock v Lauritzen,* 649 F Supp 16 (ED Wis 1986). The two District Court opinions appear, respectively, at pages 45a and 39a of the Appendix, together with the separate judgment of that court, dated September 30, 1986, which appears at page 38a of the Appendix.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 15, 1987. A petition for rehearing and suggestion for rehearing in banc was denied February 8, 1988. This Petition for Certiorari was filed within 90 days of the later date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

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STATUTORY PROVISIONS INVOLVED

At issue is whether the migrants who hand harvest Petitioners' pickle crop are Petitioners' employees for purposes of the Fair Labor Standards Act of 1938, 29 USC § 201, *et seq.*

The statute defines an "employer" as:

> Employer includes any person acting directly or indirectly in the interest of employer in relation to an employee . . .
>
> 29 USC § 203(d)

An "employee" is defined to mean:

> . . . any individual employed by an employer.
>
> 29 USC § 203(e)(1)

And "employ" is defined:

> . . . to include suffer or permit to work.
>
> 29 USC § 203(g)

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STATEMENT OF THE CASE

Petitioners (hereafter Lauritzen) conduct a multi-crop farming operation near Waupaca, Wisconsin. Pickles are among the primary crops raised. The pickle crop is hand harvested for the process market and each year the Lauritzens contract the harvest process to some seventy or so migrant contracting entities. A contracting entity is usually a migrant family but occasionally consists of an individual migrant.

This action was brought by Respondent Secretary of Labor (hereafter the Secretary) in the United States District Court for the Eastern District of Wisconsin to enjoin Lauritzen from violation of the minimum wage, record keeping and child labor provisions of the Fair Labor Standards Act of 1938, as amended, (29 USC § 201, *et seq.*) (hereafter the Act or the FLSA) and, further, to enjoin Lauritzen from withholding any unpaid compensation that might be found to be due the migrant harvesters. The Secretary contended that the contracting migrants were employees within the meaning of the FLSA and, thus, its provisions were applicable to Lauritzen. The jurisdiction of the District Court was invoked under 29 USC § 217.

Lauritzen responded that the migrants functioned as independent contractors; that they are not "employees" within the meaning of the Act; that Lauritzen was not, therefore, subject to the provisions of the Act.

The Secretary commenced discovery and, after taking the depositions of nine migrants, moved for partial summary judgment on the issue of whether the migrants who harvested the pickle crop did so as employees or as independent contractors. Lauritzen answered the motion contending that genuine issues of material fact precluded a grant of summary judgment. Lauritzen supported his contention with the affidavit of Michael Lauritzen (Appendix, pg. 59a) and with the affidavit of four of the nine previously deposed migrants (Appendix, pg. 54a), each of whom contradicted their earlier deposition testimony.

The District Court denied the presence of a genuine conflict of material fact, adjudged the migrants to be

employees and granted the Secretary's motion for a partial summary judgment. *Brock v Lauritzen,* 624 F Supp 966 (ED Wis 1985).

Subsequently, following the Secretary's deposition of Defendant Michael Lauritzen, the Secretary amended his complaint to drop the issue of minimum wage liability and again moved for summary judgment, this time with respect to the remaining alleged violations of FLSA. Lauritzen answered the Secretary's motion and, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, moved to vacate and set aside the prior partial summary judgment. The Lauritzen motion was supported by the further affidavit of Michael Lauritzen (Appendix, pg. 76a) and by the affidavit of sixteen (16) of the migrants, representing eleven (11) of the contracting entities, alleged by the Secretary to be employees of Lauritzen Farms (Appendix, pg. 66a). In their affidavit, the migrants represented that they were familiar with the material findings of fact made by the District Court in its December 20, 1985, grant of partial summary judgment. They detailed their factual disputes with the Court's findings. The sixteen migrants also moved the Court to intervene as party defendants. The District Court denied Lauritzens' motion, refused to permit intervention, again denied the presence of material factual disputes, granted the Secretary's motion for summary judgment and entered a final judgment which enjoined future violations of the Act and dismissed the action. *Brock v Lauritzen,* 649 F Supp 16 (ED Wis 1986).

The two summary judgments, together with the order denying Lauritzens' motion to vacate the first of the sum-

mary judgments, were appealed to the Seventh Circuit. The issue presented on appeal was whether genuine issues of material fact existed sufficient to preclude the grant of summary judgment. On December 15, 1987, the Seventh Circuit, acting through a panel of Circuit Judges Wood, Jr. and Flaum, with Easterbrook concurring, rendered its decision affirming the District Court. *Sec'y of Labor, U.S. Dept. of Labor v Lauritzen*, 835 F2d 1529 (7th Cir 1987).

The majority of the appellate panel (a) found the factual disputes raised by the Lauritzens to be "minor" and "not outcome determinative under governing law"[1] and (b) that no "trial was needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers are employees."[2] The concurring opinion (Easterbrook, Judge) noted: (a) the direct conflict between the opinion of the majority and the Sixth Circuit decision of *Donovan v Brandel*, 736 F2d 1114 (6th Cir 1984),[3] (b) that the majority's finding of economic dependency, the "nub" of its opinion, was in part without factual support, and (c) that the majority opinion was predicated upon subordinate facts and legitimate factual inferences strongly suggestive of an independent contractor relationship.[4] While Judge Easterbrook agreed that under governing legal rules the Lauritzens were entitled to present their case to a trier of facts,[5]

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[1]835 F2d 1529, 1534.

[2]835 F2d 1529, 1538.

[3]835 F2d 1529, 1539.

[4]835 F2d 1529, 1540, 1541.

[5]835 F2d 1529, 1543.

he nonetheless concurred, doing so on the expressed conviction that migrant farm workers are, in all cases, and as a matter of law, employees under FLSA without regard to crop or contract.[6]

The Lauritzens timely sought a rehearing and suggested the rehearing be held in banc. Their request was denied.

Petitioners now pray issuance of a Writ of Certiorari.

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REASONS FOR GRANTING THE WRIT

I. THE GRANT OF SUMMARY JUDGMENT, AND ITS AFFIRMANCE, VIOLATES, EITHER DIRECTLY OR IN PRINCIPLE, NEARLY EVERY STANDARD THAT GOVERNS THE APPLICABILITY OF SUMMARY JUDGMENT.

When Petitioners assert that the district court, by granting summary judgment, and the Court of Appeals, by affirming it, violated nearly every standard for evaluating the suitability of summary judgment, Petitioners do not do so in fear of exaggeration or motivated by their acknowledged sense of righteous indignation. Petitioners make the representation because it is in fact the case.

The fundamental issue in the dispute before the district court was whether, for purposes of the Fair Labor Standards Act, the relationship between Petitioners and the migrant harvesters was one of employment or inde-

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[6]835 F2d 1529, 1545.

pendent contractor. The Secretary moved for summary judgment on the strength of depositions from nine migrants. Petitioners countered with the affidavit of Petitioner Michael Lauritzen and the affidavit of four of the nine migrants in which they disputed and contradicted their deposition testimony.

The district court found, however, that "the material facts in this case . . . are largely undisputed" and asserted the question of employee or independent contractor to be:

> . . . fundamentally a question of law, highly approporiate for decision on summary judgment.[7]

Petitioners acknowledge that this Court is generally not responsive to a cry of error.[8] Nonetheless, Petitioners respectfully submit that the grant of summary judgment in the instant proceeding is such a blatant error and such a total disregard of summary principles that review by this Court is highly appropriate.[9]

Rule 56(c) of the Federal Rules of Civil Procedure permits the entry of summary judgment when the pleadings, depositions, interrogatories and affidavits show:

> . . . no genuine issue as to any material fact.

In adjudicating whether or not disputes exist as to genuine issues of material facts, this Court has made it axiomatic that all doubts over the presence of a disputed factual issue must be resolved against the seeking party

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[7]*Brock v Lauritzen*, 624 F Supp 966, 968 (ED Wis 1985).

[8]*Ross v Moffitt*, 417 US 600, 616-617 (1974).

[9]*Thompson v City of Louisville*, 362 US 199 (1960).

and must be viewed in the light most favorable to the party opposing the request for summary judgment. *Poller v Columbia Broadcasting,* 368 US 464, 473 (1961). Where alternative inferences may be drawn from the subsidiary facts, the factual inferences must be viewed in the light most favorable to the party opposing the motion. *United States v Diebold, Inc,* 369 US 654, 655 (1962).

And *even* if the material facts, and the inferences to be drawn from them, are not in dispute, where complex and difficult issues of law exist, the undisputed facts and inferences *must be sufficient in scope to furnish an adequate factual basis* sufficient for the court to apply the proper legal principles to resolve the issues. *Bingham, Ltd v United States,* 724 F2d 921, 926 (5th Cir 1984).

This Court has cautioned against trials by affidavit and reminded its lower courts that it is only when witnesses are present and subject to cross examination that credibility and proper weight can be given to their testimony. *Poller v Columbia Broadcasting, ante* at 473.

Moreover, when the issue before the trial court is whether, for purposes of FLSA a relationship is or is not one of employment, the trier of fact is admonished to look to:

> . . . the circumstances of the whole activity.
>
> *Rutherford Food Corp v McComb,* 331 US 722, 730 (1946)

to:

> . . . the *total situation,* including the risk undertaken, the control exercised, the opportunity for sound management . . .

> (emphasis added)
> *United States v Silk*, 331 US 704, 719 (1946)

and evaluate the relationship in terms of its:

> . . . economic reality . . .
>
> *Goldberg v Whitaker House Corp*, 366 US 28, 33 (1960)

It is not so much Petitioners' complaint that the district court misapplied these enunciated standards for evaluating the propriety of summary judgment, rather it is their complaint that the district court wholly ignored them. Petitioners' affidavits were, for all practical purposes, ignored and dismissed out of hand. The facts of the case were summarily declared to be undisputed and judgment was summarily rendered as a matter of law.

It defies logic and law to suggest that any valid analysis of the total of the economic realities governing the relationship between Petitioners and the migrant harvesters could be made solely on the basis of but nine depositions, taken under conditions of questionable translation from members of eight migrant families. A decision made without full input from the Petitioners, made without comprehension of the process of raising pickles for the process market and made without an understanding of the scope of the harvest function and the role of the migrant family within that function is a decision made without regard for the "whole" of the situation. Insufficient information is as consequential and damaging—perhaps more so—to an ascertainment of the economic

realities as misinformation. Together, misinformation and insufficient information can raise havoc.[10]

Are there indeed—as Petitioners insist—apparent and obvious genuine issues of material facts which simply forbid the grant of summary judgment or, as the District Court and Court of Appeals contend, are the facts "largely undisputed". A few examples provide self-evident answers. Petitioners use, for illustrative purposes, the factors of skill, control and of profit and loss—factors, as this Court has instructed,[11] significant to diagnosing the defference between an employee and an independent contractor. With respect to each factor, Petitioners contrast the factual finding as made by the district court with the corresponding representation made in the affidavits filed in opposition to the Secretary's motion for partial summary judgment. The factual representations set forth in these affidavits are, it must be remembered, facts to which the affiants stand ready to testify at trial, if given the opportunity. Since, as will be readily apparent, the district court's factual findings are contradicted and disputed by the facts as detailed by the affiants, and since the findings of the district court must have some genesis, the genesis must be the depositions of the nine migrants offered by the Secretary in support of its motion. If the

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[10]Non-consequential, but illustrative of the point, is the footnote aside of the 7th Circuit mocking reference by the parties to as a "pickle" crop and suggesting it must be a new seed. Had there been a trial, the court would have learned that the "pickle" is the only variety of cucumber capable of process. The skin of all other cucumbers will not tolerate brining.

[11]*United States v Silk*, ante at 716.

genesis is not the depositions, it can only be hypothetic creation—a creation Petitioners suggest happens.

Of necessity then, if factual disputes exist between the findings of the district court and the affidavits of Petitioners, so too factual disputes must exist between the testimony of the deponents or the trial court's suppositions and the facts as represented by the affiants—conflicts properly to be tested and resolved only by trial.

RE: FACTORS PERTAINING TO SKILL

The affidavit of the four migrants filed in opposition to the Secretary's motion for partial summary judgment, provides:

> That while the physical act of picking a pickle is the simple act of reaching, the process of hand harvesting pickles so as to maximize income requires a skill and expertise which can only be learned and developed over one or more complete harvest seasons; that the care of the pickle plants during the harvest season so as to maximize the number of pickings, the selection of grade so as to maximize profits, the knowledge of when to pick for quality and grade yields—these and other skills and knowledge necessary for increased earnings cannot be learned in hours or days; that effort and hard work, by itself, has little effect on increased earnings; that "what" and "when" is as important as "how".
>
> (Appendix pg. 56a, para. 9)

The district court, however, at acute angle to the statements of the affiants, made the factual determination that "the process is simple" and "little skill is required in the hand harvest of cucumbers." 624 F Supp at 967, 969.

RE: FACTORS PERTAINING TO SUPERVISION AND CONTROL

The affidavit of the four migrants provides:

> That each deponent and family contracted with Lauritzen Farms to hand harvest the pickle crop from a parcel of farmland over which the deponent and family had and exercised exclusive possession and control.
>
> (Appendix pg. 55a, para. 6)
>
> That as to each deponent's parcel of land, the harvest process was handled exclusively by deponent and family and at all times without supervision, direction or control from Lauritzen Farms or any of its agents or employees; that all decisions made with respect to the harvest process of what to do, when to do and how to do were determined solely by deponent and family.
>
> (Appendix pg. 55a, para. 7)
>
> That the parcel of land harvested by deponent and family was selected by deponent, or by a member of deponent's family, from available parcels not previously selected by other harvesters.
>
> (Appendix pg. 55a, para. 8)

The district court, instead of acknowledging the *presence* of a factual dispute with respect to supervision, *resolved* the dispute by finding that "the workers are supervised, however minimally, by Lauritzen" and that Lauritzen "also assigns each family a section of cucumber vines to harvest" and "assigns them the appropriate number of rows." 624 F Supp at 966, 967.

RE: FACTORS PERTAINING TO PROFIT AND LOSS

The affidavit of the four migrants, and the affidavit of Michael Lauritzen also filed in opposition to the motion for summary judgment, set forth the following facts concerning opportunities for profit and loss:

> . . . none of the deponents was paid or guaranteed a minimum wage or minimum level of income; the sole compensation of each deponent and family with respect to the Lauritzen Farm pickle harvest is the 50% or more of the sales proceeds paid each deponent and family for the crop they harvested.
>
> (Appendix pg. 56a, para. 10)

> Proceeds from the sales of the pickle harvest are, in the case of each deponent, divided equally between deponent and the migrant family except, as previously noted, sales proceeds generated during the final week of the harvest season, when the migrant family receives a greater percentage of total proceeds. Depending upon the experience, skill and managerial ability of the migrant family, comparative earnings vary greatly among families.
>
> (Appendix pg. 62a, para. 10)

> . . . If there are no sale proceeds, there is no compensation to the migrant family. No guarantees of income exist. The migrant family and deponent are equally at risk with respect to weather, insects, and blight, and the market place. The hand harvest of pickles is a process that requires judgment and experience more merely than the application of tools and equipment.
>
> (Appendix pg. 63a, para. 12)

The district court, rather than recognizing that a factual dispute surrounding the opportunity for profit and loss, resolved the issue by holding: "the workers have little opportunity for profit or loss based upon their managerial skills" and "they are paid for the cucumbers picked regardless of whether Lauritzen sells them to a processor." 624 F Supp at 968, 969.

In at least two instances the district court made factual findings wholly without foundation in the record. "Without harvest workers," the court stated, "Lauritzens' crop would rot on the vine." 624 F Supp at 969. This factual finding enabled the court to come to the factual conclusion that the migrants were an integral part of the business of Lauritzen Farms.

There is nothing, absolutely nothing, in the pleadings, or in the depositions and affidavits considered by the court, that references, mentions or supports such a finding. In fact, quite the opposite is true. In his second affidavit, Michael Lauritzen denied that the pickle crop would rot if not hand harvested by migrants.

> The pickle crop grown at Lauritzen Farms, if not harvested by contracting families, would not and does not rot in the fields. Each year that portion of the pickle crop not under contract for its harvest is harvested by machine. A machine harvest reduces yield but all sales proceeds go to Lauritzen Farms.
>
> (Appendix pg. 80a, para. 12)

The district court also found that:

> Furthermore, the workers are paid for the cucumbers picked regardless of whether Lauritzen

> sells them to a processor; thus, they bear little risk of loss."
>
> (624 F Supp at 969)

From this conclusion, the district court arrived at the significant factual conclusion that the migrants "bear little risk of loss." At no place, however, in any deposition given by any migrant, or in any affidavit, is there any support for the contention that the harvesters are paid regardless of whether the pickles are sold. Although the affidavits of Michael Lauritzen and the four migrants filed in opposition to the motion for summary judgment specifically state that the migrants received payment only from realized sales proceeds,[12] the district court nevertheless found it to be non-disputed that the migrants were paid whether or not the harvest was sold.

In support of their request that the district court vacate and set aside its summary judgment rendered on December 20, 1985, Petitioners filed the further affidavit of Michael Lauritzen (Appendix pg. 76a) together with a collective affidavit of 16 migrants who have contracted with Lauritzen Farms for the hand harvest of pickles (Appendix pg. 66a). The affidavit of the migrants states that the text of the December 20 summary judgment (Appendix pg. 45a) was read to them and explained by those among them skilled both in English and in the dialect of the migrants. In their affidavit the migrants identified nine (9) material factual conclusions declared by the court to be undisputed. With respect to each of the nine instances, the migrants detail the relevant facts as they know them to be and in each instance the facts as known

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[12]Appendix pg. 56, para. 10; 63a, para. 12.

to the migrants collide at acute angle with the district court's perception of the facts. The affidavit of Michael Lauritzen and the affidavit of the migrants suggest—no, clearly illustrate—that the court did not have before it an undisputed factual foundation sufficiently comprehensive to permit summary disposition of the question of "employee" or "independent contractor." With clarity, Petitioners' affidavits demonstrate that the district court did not confine itself to the single determination of whether issues of factual dispute exist but, rather, brushed aside the question of "whether" and proceeded to resolve the disputes—and in so doing trangressed in hob nail boots where judicially prohibited.

In bringing their appeal to the Seventh Circuit, Petitioners asserted, again as the sole issue, that genuine issues of material fact existed to preclude a grant of summary judgment.

Despite the often repeated mandate of this Court that since Petitioners suffered the summary judgment, Petitioners' version of the facts must be accepted as true,[13] the panel's majority summarily dismissed Petitioners' contentions of genuine material factual disputes. In a single conclusionary paragraph, absent any analysis, the panel majority provided:

> We need not generally review again the requirements of disposition by summary judgment, except to note that a minor factual dispute does not preclude summary judgment. The disputed facts must be "outcome determinative under the governing law." *Hossman v. Spradlin*, 812 F.2d

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[13] *Bishop v Wood*, 326 US 341, 347 (1975).

> 1019, 1029-21 (7th Cir. 1987) (per curiam); *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). The court should neither "look the other way" to ignore genuine issues of material fact, nor "strain to find" material fact issues where there are none, and we shall not. *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972).
>
> (Appendix pg. 10a)

Thereafter, no further attention was given by the majority to the question of a material factual conflict. The issue on appeal, as raised by Petitioners, was redefined by the panel to "whether the migrant workers who harvest the pickle crop of defendant Lauritzen Farms, in effect defendant Michael Lauritzen, are employees for purposes of the Fair Labor Standards Act of 1938 ("FLSA"), or are instead independent contractors not subject to the requirements of the Act."[14]

Having so recast the issue, the panel majority then described as its appellate function:

> We must examine the factual background of the case to determine whether the employment status of the migrant workers could be concluded as a matter of law.
>
> (Appendix pg. 5a)

and concluded that:

> No trial is needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers

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[14]Appendix pg. 3a.

> are employees, entitled to the protection of the FLSA.
>
> (Appendix pg. 20a)

In the recent decision of *Anderson v Liberty Lobby, Inc.*, 477 US 242 (1985), this Court, speaking through Justice White, reviewed at great length the requirements of Rule 56(c) of the Federal Rules of Civil Procedure and the task of the court in determining the propriety of a grant of summary judgment under the Rule. To support a summary judgment, the Court noted, "the requirement is that there be no *genuine* issue of *material fact.*"[15] As to materiality:

> . . . the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.
>
> *Ante* at 248

The "threshold inquiry," continued this Court, is to determine whether there are any genuine factual issues that "may reasonably be resolved in favor of either party."[16] The Court cautioned that this evaluation process does not authorize trial by affidavit.[17] The "function of the Court is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."[18] *And*, in so doing:

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[15]477 US at 248 (emphasis by the Court).

[16]477 US at 250.

[17]477 US at 255; the precise fate suffered by Petitioner throughout these proceedings.

[18]477 US at 249.

> The evidence of non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.
>
> *Anderson v Liberty Lobby, Inc*
> *Ante* at 248

To survive a motion for summary judgment, this Court repeated as it concluded its decision in *Anderson*, the non-movant "need only present evidence from which a jury might return a verdict in his favor."[19]

The majority of the circuit panel, however, in its recitations of the record either refused to believe or simply ignored the Petitioners and their protestations of factual dispute.

The panel majority dismissed the affidavit of the four migrants as creating no factual issue, calling it conclusionary in text, obviously in the language of a lawyer. Lauritzen's affidavit was not found to differ in a material way from the findings of the district court except as an "effort to make an employment arrangement appear to be more than it is.[20]

Instead of analyzing whether a sufficient factual basis might exist, including all justifiable inferences of fact, upon which a reasonable mind might conclude for Petitioners, the majority of the panel directed its search toward whether a sufficient factual basis existed to support the conclusions sought by the Secretary—i.e. was there sufficient support from which one might conclude an employee-employer relationship.

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[19]477 US at 257.

[20]835 F2d at 1534.

The proper function—the only function—of the panel, Petitioners submit, should have been to examine the whole of the factual record and, with all questions of credibility and factual inference resolved in Petitioners' favor, determine whether a reasonable mind might conclude an independent contractor relationship. In short, contrary to the instruction of *Anderson v Liberty Lobby, Inc.*, the panel gave deference and preference to the moving party rather than the non-moving party.

Preliminary to its review of the findings of the district court, the panel majority focused on the recent Fifth Circuit case of *Brock v Mr. W Fireworks, Inc.*, 814 F2d 1042 (5th Cir 1987). Guided by the Fifth Circuit decision, the panel concluded that the factual findings made by the District Court should not be set aside unless "clearly erroneous" (Appendix pg. 12a). The panel then measured all factual findings made by the district court, and their attendant inferences, against the standard of whether such findings and inferences were clearly erroneous.

In *Mr. W Fireworks,* the Fifth Circuit, however, was reviewing factual determination made by a district court *after* a three day bench trial. *Brock v Mr. W Fireworks, Inc., ante* at 1043. Such being the case, it was entirely appropriate that the trial court's factual finding be gauged by the clearly erroneous rule. In the instant case no trial has yet been had and the issue before the Seventh Circuit was whether a summary judgment was properly granted. The panel majority inappropriately looked only to whether the factual determinations made by the district court were clearly erroneous rather than seeking to ascertain whether these facts, and their attendant inferences, might

reasonably have been found to support Petitioners' position.

The panel majority infers that Petitioners are not entitled to a trial because Petitioners have failed to produce disputed facts "outcome determinative" in scope.[21] Although not so cited by the majority, the panel's criticism is suggestive of this Court's holding in *Celotex Corp v Catrett,* 477 US 317, 322 (1985), that the failure of a non-moving party to make a sufficient showing of the essential elements of his case may doom the party to summary judgment. Petitioners submit, however, that in the context of this case, neither the Seventh Circuit's criticism nor the holding in *Celotex* is relevant or appropriate. *Rutherford Food Corp v McComb, ante* at 730, admonishes, and the majority panel acknowledge, that none of the six or so individual elements proscribed as proper criteria for determining the "economic reality" of a working relationship is, of itself, *or by its absence,* outcome determinative; that each factor must be separately considered, then collectively weighed; that it is only their collective effect that determines the "reality" of a given situation. To impose upon a non-moving party, as the Seventh Circuit would do, the obligation to show disputed facts sufficient to define the work relationship is to impose upon the party an obligation without measurable definition. Depending upon the court involved, the escape from summary judgment could be more demanding than an escape from liability under the Act itself. No non-moving party ought to be relegated to a summary judgment for a failure to show

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[21]835 F2d at 1534.

disputed facts sufficient to be outcome determinative when, by direction of *Rutherford,* there exists no particular factor the presence or absence of which is essential to the outcome. To impose such a requirement—to impose, as it were, the consequence of *Celotex*—is to create for litigants a classic "catch 22."

Judge Easterbrook concurred in the decision of the panel majority. While he affirmed the result, he refused to endorse the method. Judge Easterbrook concurred because he feels, as a matter of law, that for purposes of FLSA, all migrants, in all cases, should be employees irrespective of crop or contract.[22] Concurrence in the proposition that all migrants, at all times, irrespective of crop or contract, are employees does not, however, prevent Judge Easterbrook from repeatedly demonstrating, with clarity and preciseness, that the disputed material facts of this case could equally support a conclusion that the migrant harvesters are independent contractors (Appendix pgs. 23a-31a). If Judge Easterbrook can be considered "a rational trier of fact," to use the language of *Matsushita Elec Industrial Co v Zenith Radio,* 475 US 574, 587 (1985), and if Judge Easterbrook can find, as he did, that the factors presented to the court "cut both ways";[23] that the facts relative to the element of control "strongly suggest an independent contractor relation";[24] that the dependency of the harvesters on Lauritzen was no different a dependency than the dependency experienced by any

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[22]835 F2d at 1545.

[23]835 F2d at 1542.

[24]835 F2d at 1540.

independent contractor relationship;[25] that the sharing of sales proceeds was more a characteristic of independent contractor than employee[26]—then how can it be said, either as a matter of fact or a matter of law, that Petitioners have failed to create a sufficiency of showing to permit presentation of their case to a trier of fact.

Petitioners submit that given three circuit judges, if one judge finds that relevant material facts might reasonably be found by a trier of facts to support the position of the non-movant party, then as a matter of law, summary judgment can not be appropriate. It defies definitional logic and gives new meaning to the term "legal fiction" to hold by a split[27] decision that no disputes exist when the issue is the presence or absence of disputed material facts.

Judge Easterbrook states, and Petitioners concur, that if the work relationship is to be adjudged by multiple factors, there should be a trial.[28] A fact-bound approach calling, to quote Judge Easterbrook, "for the balancing of incommensurables" in which no particular factor is decisive, is an approach which, absent an agreed set of facts, mandates a trial and forbids summary judgment as a matter of law. For a similar mind set, see *Pullman-Standard v Swint,* 456 US 273, 287-288 (1982); *Baker v Texas & Pacific Railway Co,* 359 US 227, 228 (1958).

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[25]835 F2d at 1542.

[26]835 F2d at 1542.

[27]As to this point, Petitioners submit, the concurring opinion is more appropriate a dissent.

[28]835 F2d at 1542-1543.

II. THE DECISION OF THE SEVENTH CIRCUIT CREATES A DIRECT AND IRRECONCILABLE CONFLICT WITH THE SIXTH CIRCUIT DECISION OF DONOVAN v BRANDEL, 736 F2d 1114 (6th Cir 1984).

The factual setting of *Donovan v Brandel*, 736 F2d 1114 (6th Cir 1984) and the factual setting of the instant case are, for all practical purposes, indistinguishable. Both cases have as their factual and historical context the hand harvest of pickles bound for the process market by migrant families entrusted with the harvest responsibility in exchange for 50% of the sales proceeds. The Seventh Circuit acknowledges the similarity of circumstances between the two cases,[29] and in its decision consistently contrasts with *Brandel* the factual inferences it draws from near identical subsidiary facts. The only significant discernible difference between the two cases is the fact that *Brandel* resulted from a comprehensive factual record produced at trial while the factual conclusions of the Seventh Circuit were forged from a far less comprehensive record.

While the factual circumstances between the two cases may be the same, the conflict between them in result is direct, relevant and irreconcilable. And it is readily apparent that this conflict will not be resolved merely by the passage of time, absent the intervention of this Court, nor reduced in scope by future considerations.

Brandel holds that migrant pickle harvesters who have been delegated the harvest responsibilities for a share of the sales proceeds can be, as a matter of law, independent contractors in a work relationship outside the scope of

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[29]835 F2d at 1536.

FLSA. On a like fact base, the Seventh Circuit has determined that, as a matter of law, the same migrant harvesters are employees for purposes of FLSA. Judge Easterbrook introduces his concurring opinion with an acknowledgment of this direct conflict between the two circuits.

Mr. Brandel and all pickle farmers in the Sixth Circuit, with only Lake Michigan to distinguish between themselves and the Lauritzens, may raise their pickles in the work relationship of independent contractor. Mr. Lauritzen, and those like him in the Seventh Circuit, function in an employer-employee relationship for purposes of FLSA. And the consequences that flow from the different treatments afforded their identical circumstances are not insignificant or of little moment. How the work relationship is treated for purposes of FLSA impacts Brandel and Lauritzen, and their migrant harvesters, for purposes of the Internal Revenue Code,[30] Social Security Act,[31] The Migrant and Seasonal Agricultural Worker Protection Act.[32] For Lauritzen, it is not simply, as the Seventh Circuit suggests, a case where all that need change is the label put to the arrangement.[33]

The ultimate question—the jugular issue in determining the nature of the work relationship—is whether or not it is "economically realistic" to view the relation-

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[30]*Bartels v Birmingham,* 332 US 126 (1946).

[31]*General Inv Corp v United States,* 823 F2d 337 (9th Cir 1987).

[32]29 USC § 1801(2); 29 CFR § 500.20(h)(ii).

[33]In the case of Lauritzen, the Wisconsin Migrant Law. Wis. Stat. Ann. § 103.90-.97 (West 1987).

ship as one of employment. *United States v Silk,* 331 US 704, 713 (1947); *Goldberg v Whitaker House Cooperative,* 336 US 28, 33 (1961). And it becomes "economically realistic" to treat the relationship as one of employer-employee where the party rendering the service is economically "dependent" upon the party receiving the service. If the party rendering the service can be said, as a matter of economic fact, to be independent of the other party—to be in business, as it were, for himself, his actions being the manifestations of an entrepreneur—then a condition of employment does not apply. *Usery v Pilgrim Equip Co,* 527 F2d 1308, 1311-1312 (5th Cir), *cert denied,* 429 US 826 (1976).

This court has ordained certain guidelines or factors with which to weigh and evaluate the economic reality of a work situation. *Rutherford Food Corp v McComb,* 331 US 722 (1946); *United States v Silk,* 331 US 704, 716 (1946). These guidelines, we are admonished, are not to be considered as inclusive, nor is any one of them, of itself, to be deemed controlling.

The guidelines have been summarized thusly:

a) the degree of the alleged employer's right to control the manner in which the work is to be performed;

b) the alleged employee's opportunity for profit or loss, depending upon his managerial skill;

c) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

d) whether the service rendered requires a special skill;

e) the degree of permanence of the working relationship; and

f) whether the service rendered is an integral part of the alleged employer's business.

Real v Driscoll Strawberry Assoc, Inc, 603 F2d 748 (9th Cir 1979)

Both Circuits ostensibly applied the same factors, yet perceive the difference in manner of application:

Control:

Brandel — who controls the harvest function

Lauritzen —who exercises overall control of the entire farming operation, not just the details of harvest.

Investment:

Brandel — who has the capital necessary for the contracted task

Lauritzen —what is the relative capital investments of migrant and farmer

Skill:

Brandel — skill was perceived in the management of the harvest

Lauritzen —management of the harvest was seen only as an endurance and physical aptitude

Profit and Loss:

Brandel — equated more nearly to loss or gain of income due to management skills

Lauritzen —equated to an investment return on business capital

The factors as above defined and applied by the Sixth Circuit permit the migrant harvester to function as an independent contractor. In contrast, as defined and applied by the Seventh Circuit, independent contractor status becomes a conceptual impossibility not only for migrant pickle harvesters but for migrants in all instances.

Petitioners accept that statutory definitions of employer-employee under FLSA must be broad and comprehensively construed to permit the remedial purposes of the Act. It is not, however, the purpose of the Act to include, as employees, all who may render service for another or to ignore entirely legal employment classifications made for legitimate purposes. *Board v Hearst Publications,* 322 US 111, 124 (1943); *United States v Silk, ante* at 712.

However, by defining and applying the factors of evaluation, as they have, the courts below have effectively made certain the per se result that at least all migrant farm workers will be employees under FLSA. But in so doing, the courts below disregard the case by case pursuit of economic reality as mandated by *Rutherford* and *Silk* and make Petitioners' efforts at a presentation of the totality of his circumstances a foregone exercise in futility. The pursuit by the Secretary of Labor of a per se rule that all migrant farm workers are employees under FLSA was perceived in *Brandel* and rejected by the Sixth Circuit as inconsistent with applicable principles of law. *Donovan v Brandel, ante* at 1120. This Court should now issue its Writ to similarly instruct the Seventh Circuit.

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CONCLUSION

For these reasons, Petitioners pray a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit. In the event that the Petition is granted, Petitioners will pray that the judgment of the Court below be reversed and the cause remanded for trial in accordance with the instructions of this Court.

Respectfully submitted,

DATED: May 9, 1988

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 8, 1988.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 86-2770	)	
	)	
SECRETARY OF LABOR	)	Appeal from the
United States Department of Labor,	)	United States
Plaintiff-Appellee,	)	District Court
	)	for the
vs.	)	Eastern District
	)	of Wisconsin.
MICHAEL LAURITZEN and	)	
MARILYN LAURITZEN,	)	No. 84 C 980
individually and doing business as	)	Terence T. Evans,
LAURITZEN FARMS,	)	*Judge.*
Defendants-Appellants.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellants on January 12, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 15, 1987.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 86-2770 vs.	)	
MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITZEN FARMS, *Defendants-Appellants.*	)	No. 84 C 980 Judge Terence T. Evans

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2770

SECRETARY OF LABOR
United States Department of Labor,
Plaintiff-Appellee,

v.

MICHAEL LAURITZEN and MARILYN LAURITZEN,
individually and doing business as
LAURITZEN FARMS,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 84 C 980—Terence T. Evans, *Judge.*

ARGUED MAY 27, 1987—DECIDED DECEMBER 15, 1987

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* This, as unlikely as it may at first seem, is a federal pickle case. The issue is whether the migrant workers who harvest the pickle crop of defendant Lauritzen Farms, in effect defendant Michael Lauritzen, are employees for purposes of the Fair Labor Standards Act of 1938 ("FLSA"),[1] or are instead independent

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[1] 29 U.S.C. § 201 *et seq.*

contractors not subject to the requirements of the Act.[2] The Secretary, alleging that the migrant harvesters are employees, not independent contractors, brought this action seeking to enjoin the defendants from violating the minimum wage requirements and to enforce the record-keeping and child labor provisions of the Act.

After discovery, which entailed principally collecting depositions of migrant workers who had worked for the defendants, the Secretary moved for partial summary judgment. The defendants countered with affidavits of some of the previously deposed migrant workers which contradicted their earlier depositions. The contradictions were charged to language interpretation difficulties and to the absence of defendants' counsel when the depositions were taken.[3] The district court granted the Secretary partial summary judgment, determining the migrants to be employees, not independent contractors. *Brock v. Lauritzen*, 624 F. Supp. 966, 970 (E.D. Wis. 1985) (*Lauritzen I*). Trial was then set to determine the remaining issues of possible minimum wage violations, child labor violations, and the sufficiency of the defendants' statutorily required record keeping. By an amended complaint, however, the minimum wage violation allegations were

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[2] All the parties refer to the crop to be harvested as the "pickle crop," and so shall we. Perhaps the defendants have developed a remarkable new "pickle" seed. But whether they grow pickles or only potential pickles in the form of cucumbers, the law is the same.

[3] The absence of defendants' counsel at the depositions was the fault of the defendants or of their counsel, who was later replaced. The government, however, gave the usual notice to take the depositions in Texas where the migrant workers were then located.

eliminated. The Secretary then sought summary judgment on the remainder of the case. Some migrant workers sought unsuccessfully to intervene to protect their claimed contractual status. The defendants protested that they had raised material factual issues, but the district court disagreed. The district court found that the controlling material facts were largely undisputed and entered final judgment on the issues of record-keeping and child labor violations, enjoining the defendants from further violations of the Act, and dismissing the action. *Brock v. Lauritzen,* 649 F. Supp. 16, 18-19 (E.D. Wis. 1986) (*Lauritzen II*). Both summary judgment orders were appealed as well as the district court's denial of the defendants' motion under Federal Rule of Civil Procedure 60(b)(6), seeking relief from the first entry of partial summary judgment.

I. FACTUAL BACKGROUND

We must examine the factual background of the case to determine whether the employment status of the migrant workers could be concluded as a matter of law.

On a yearly basis the defendants plant between 100 to 330 acres of pickles on land they either own or lease. The harvested crop is sold to various processors in the area. The pickles are handpicked, usually from July through September, by migrant families from out of state. Sometimes the children, some under twelve years of age, work in some capacity in the fields alongside their parents. Many of the migrant families return each harvest season by arrangement with the defendants, but, each year, other migrant families often come for the first time from Florida, Texas and elsewhere looking for work. The defen-

dants would inform the families, either orally or sometimes in writing, of the amount of compensation they were to receive. Compensation is set by the defendants at one-half of the proceeds the defendants realize on the sale of the pickles that the migrants harvest on a family basis. Toward the end of the harvest season, when the crop is less abundant and, therefore, less profitable, the defendants offer the migrants a bonus to encourage them to stay to complete the harvest, but some leave anyway.

Wisconsin law requires a form "Migrant Work Agreement" to be signed, and it was used in this case. It provides for the same pay scale as is paid by the defendants except the minimum wage is guaranteed. The Wisconsin Migrant Law invaldiates agreements that endeavor to convert migrant workers from employees to independent contractors. Wis. Stat. Ann. § 103.90-.97 (West 1987); 71 Op. Att'y Gen. Wis. 92 (1982). Accompanying the work agreement is a pickle price list purporting to set forth what the processors will pay the defendants for pickles of various grades. This price list is the basis of the migrant workers' compensation. The workers are not parties to the determination of prices agreed upon between the defendants and the processors.

All matters relating to planting, fertilizing, insecticide spraying, and irrigation of the crop are within the defendants' direction, and performed by workers other than the migrant workers here involved. Occasionally a migrant who has worked for the defendant previously and knows the harvesting will suggest the need for irrigation. In order to conduct their pickle-raising business, the defendants have made a considerable investment in land, build-

ings, equipment, and supplies. The defendants provide the migrants free housing which the defendants assign, but with regard for any preference the migrant families may have. The defendants also supply migrants with the equipment they need for their work. The migrants need supply only work gloves for themselves.

The harvest area is subdivided into migrant family plots. The defendants make the allocation after the migrant families inform them how much acreage the family can harvest. Much depends on which areas are ready to harvest, and when a particular migrant family may arrive ready to work. The family, not the defendants, determines which family members will pick the pickles.. If a family arrives before the harvest begins, the defendants may, nevertheless, provide them with housing. A few may be given some interim duties or be permitted to work temporarily for other farmers. When the pickles are ready to pick, however, the migrant family's attention must be devoted only to their particular pickle plot.

The pickles that are ready to harvest must be picked regularly and completely before they grow too large and lose value when classified. The defendants give the workers pails in which to put the picked pickles. When the pails are filled by the pickers the pails are dumped into the defendants' sacks. At the end of the harvest day a family member will use one of defendants' trucks to haul the day's pick to one of defendants' grading stations or sorting sheds. After the pickles are graded the defendants give the migrant family member a receipt showing pickle grade and weight. The income of the individual families is not always equal. That is due, to some extent, to the

ability of the migrant family to judge the pickles' size, color, and freshness so as to achieve pickles of better grade and higher value.

The workers describe their work generally as just "pulling the pickles off." It is not always physically easy, however, because the work involves stooping and kneeling and constant use of the hands, often under a hot sun. Picking pickles requires little or no prior training or experience; a short demonstration will suffice. One migrant worker recalled that when he was ten years old it had taken him about five minutes to learn pickle picking. Pickles continue to grow and develop until picked, but not uniformly, so harvesting is a continuing process. The migrant workers' income depends on the results of the particular family's efforts. The defendants explain that the migrants exercise care for both the plants and the pickles, which results in maximum yields, a benefit to the family as well as to the defendants. Machine harvesting, although advantageous for other crops, is not suitable for pickle harvesting. The defendants leave the when and how to pick to the families under this incentive arrangement. The defendants occasionally visit the fields to check on the families, the crop, and to supervise irrigation. The defendant, Michael Lauritzen, who actually operates the business, is sometimes referred to as the "boss." Some workers expressed the belief that he had the right to fire them.

The district court considered the factual background generally set forth above to be largely undisputed. *Lauritzen I*, 624 F. Supp at 966. The defendants deny that some of the facts are undisputed because some of the migrants

subsequently changed their testimony. They argue that some migrants had language problems which caused them to respond incorrectly during their depositions. To support this argument, the defendants presented counteraffidavits from four migrants which allege in conclusory language that their relationship with the defendants had been at all times "that of an independent businessman or contractor and not one of an employee." They "contracted," they say, with the defendants. In other respects these later counteraffidavits did not dispute the basic factual background that we have recounted, except that these four migrants claimed that their pickle-picking expertise required at least a complete harvest to develop. The conclusion set forth in the affidavit, obviously in the language of a lawyer, not that of the migrants themselves, create no material factual issues.

The affidavits of defendant Michael Lauritzen, for the most part, track the facts found to be undisputed by the trial judge, adding only more detail. Lauritzen claims that the Wisconsin pickle industry as a whole considers the relationship with migrant workers to be contractual. He explains that hourly compensation does not maximize revenues, and that the more proficient migrants would not work except through a contractual relationship. He denies that the workers receive any compensation if there are no pickle harvest sale proceeds. Other aspects of the pickle business, Lauritzen points out, such as crop dusting, also are done by contract. Nothing in the Lauritzen affidavit differs in any substantial way from the trial court's view of the facts, except that stress is placed on certain details in an effort to make an employment arrangement appear to be more than it is.

II. STANDARDS OF REVIEW

We need not generally review again the requirements of disposition by summary judgment,[4] except to note that a minor factual dispute does not preclude summary judgment. The disputed facts must be "outcome determinative under the governing law." *Hossman v. Spradlin*, 812 F.2d 1019, 1020-21 (7th Cir. 1987) (per curiam); *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). The court should neither "look the other way" to ignore genuine issues of material fact, nor "strain to find" material fact issues where there are none, and we shall not. *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972).

It is well recognized that under the FLSA the statutory definitions regarding employment[5] are broad and comprehensive in order to accomplish the remedial purposes of the Act. *See, e.g., United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1944); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). Courts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage. We are seeking, instead, to determine "economic reality." *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987); *Karr v.*

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[4] Fed. R. Civ. P. 56(c).

[5] The Act defines an employee simply as "any individual employed by an employer." 29 U.S.C. § 203(a)(1). An "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). To "[e]mploy includes to suffer or permit to work." 29 U.S.C. § 203(g).

Strong Detective Agency, Inc., 787 F.2d 1205, 1207 (7th Cir. 1986). For purposes of social welfare legislation, such as the FLSA, " 'employees are those who as a matter of economic reality are dependent upon the business to which they render service.' " *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299 (5th Cir. 1975) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

In seeking to determine the economic reality of the nature of the working relationship, courts do not look to a particular isolated factor but to all the circumstances of the work activity. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.

Among the criteria courts have considered are the following six:

1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;

2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;

4) whether the service rendered requires a special skill;

5) the degree of permanency and duration of the working relationship;

6) the extent to which the service rendered is an integral part of the alleged employer's business.

See Bartels v. Birmingham, 332 U.S. 126, 130 (1947); *Rutherford Food Corp.*, 331 U.S. at 730; *United States v. Silk*, 331 U.S. 704, 716 (1947); *see also Donovan v. Dial-America Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir.), *cert. denied*, 474 U.S. 919 (1985); *Donovan v. Brandel*, 736 F.2d 1114, 1119-20 (6th Cir. 1984). This court previously has held that the determination of workers' status is a legal rather than a factual one, and therefore not subject to the clearly erroneous standard of review. *Karr*, 787 F.2d at 1206. The underlying facts, however, are necessarily subject to that standard. *Id.*

The Fifth Circuit recently discussed the types of findings involved in determining whether workers are employees within the meaning of the FLSA. *Mr. W Fireworks*, 814 F.2d at 1044-45. According to the Fifth Circuit, a district court makes three kinds of findings under the Act. The first are the historical findings of fact that underlie the findings regarding the six factors mentioned above. An example of such a finding in this case is the court's finding that the migrant workers supplied their own gloves. As the Fifth Circuit found, "[i]t is beyond cavil . . . that these findings of historical fact are subject to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a)." *Id.* at 1044.

The findings as to the six factors themselves constitute the second tier of findings under the Act. The Fifth Circuit explained that these findings are "plainly and simply based on inferences from facts and thus are questions of fact that we may set aside only if clearly erroneous." *Id.* The court went on to say that

> [t]wo caveats are necessary, however. Although we may only set aside factual findings of the district

> court if we have a firm and definite conviction that a mistake has been made, this must not serve as an excuse to avoid comprehensively canvasing the record with great care. For us to do otherwise, would abrogate our role and duty as a reviewing court. Congress surely did not intend Rule 52(a) to constrict as a Victorian corset, binding the courts of appeals to the findings of the district court absent a careful and fitting examination. Second, we must ensure that the factfinding of the district court is performed with the proper legal standards in mind. Only then can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact. The district court's analysis, of course, is subject to plenary review by this court, to ensure that the district court's understanding of the law is proper.

Id. at 1044-45 (citations omitted).

The third level of findings is the district court's ultimate conclusion as to whether the workers are employees or independent contractors. The Fifth Circuit found, as we have, that the legal effect of the fact findings is a question of law. *Id.* at 1045; *Karr*, 787 F.2d at 1206.

III. ANALYSIS

In a number of agricultural cases, albeit nonpickle cases, courts have applied the six criteria to find an employment, rather than a contractual, relationship. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); *Driscoll Strawberry Associates*, 603 F.2d 748; *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973). In some other cases involving migrant workers in similar circumstances, an employment relationship was either admitted or assumed, and was therefore not an issue. *See e.g., Washington v. Miller*, 721 F.2d 797 (11th Cir. 1983);

Bueno v. Mattner, 633 F. Supp. 1446 (W.D. Mich. 1986); *Alzalde v. Ocanas*, 580 F. Supp. 1394 (D. Colo. 1984).

In one case, however, *Donovan v. Brandel*, the Sixth Circuit affirmed the district court in classifying migrant workers harvesting pickles, under circumstances similar to those here, as independent contractors, not employees. 736 F.2d 1114 (6th Cir. 1984). Even in its own circuit, however, that case has been narrowed and distinguished. Although *Donovan v. Gillmor*, 535 F. Supp. 154 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982), was decided before *Brandel*, the pre-*Brandel* holding in *Gillmor* was thereafter reexamined by the same district court in 1986. After the *Brandel* decision was announced in that circuit, the district court reaffirmed its original, inconsistent, holding in an unpublished order. *Brandel* itself took note of the prior contrary holding in *Gillmor* and distinguished *Gillmor* on a factual basis without revealing which factual distinctions the court considered to be critical. 736 F.2d at 1120, n.11. Although some factual differences are evident between this case and *Gillmor*, the situations are basically similar.[6] *Brandel* is also similar to this case, but we view the factual similarities differently than did the *Brandel* court.

A. Control

The *Brandel* court found that the landowner, under a sharecropping arrangement, had effectively relinquished control of harvesting to the migrants. The court con-

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[6] In *Gillmor* the migrants did harvest crops other than pickles, for which they were paid additional sums. They always worked exclusively for the one employer.

sidered this to be a factor in its finding that the migrant workers were independent contractors. In view of the pervasive overall control retained by the defendants here, we do not reach the same finding. We view the wage arrangement as no more than a way to effectively motivate employees, and to provide a means of determining their wages.

Brandel, according to the Sixth Circuit, did not retain "the right to dictate the manner in which the details of the harvesting function are executed." *Brandel*, 736 F. 2d at 1119. For example, he did not appear in the fields to supervise the workers, or set hours for them to work. In this case, the defendants did occasionally visit the families in the fields. The workers sometimes referred to Michael Lauritzen as the "boss," and some of them expressed a belief that he had the right to fire them. Moreover, unlike the Sixth Circuit, we believe that the defendants' right to control applies to the entire pickle-farming operation, not just the details of harvesting. The defendants exercise pervasive control over the operation as a whole. We therefore agree with the district court that the defendants did not effectively relinquish control of the harvesting to the migrants. *Lauritzen I*, 624 F. Supp. at 968.

B. Profit and Loss

The Sixth Circuit found that the migrant workers had the opportunity to increase their profits through the management of their pickle fields. *Id.* Although the court found little or no evidence in the record supporting a finding that the workers were exposed to any risk of loss,

it found the fact that their remuneration would increase through their management efforts to be dispositive of the profit and loss analysis. We do not agree. Although the profit opportunity may depend in part on how good a pickle picker is, there is no corresponding possibility for migrant worker loss. As the *Gillmor* court held, a reduction in money earned by the migrants is not a loss sufficient to satisfy the criteria for independent contractor status. 535 F. Supp. at 162. The migrants have invested nothing except for the cost of their work gloves, and therefore have no investment to lose. Any reduction in earnings due to a poor pickle crop is a loss of wages, and not of an investment. *Lauritzen I*, 624 F. Supp. at 969.

C. Capital Investment

The capital investment factor is interrelated to the profit and loss consideration. The *Gillmor* court characterized the investment in this context to be "large expenditures, such as risk capital, capital investments, and not negligible items or labor itself." 535 F. Supp. at 161. The workers here are responsible only for providing their own gloves. Gloves do not constitute a capital investment. As in *Gillmor*, "[e]verything else, from farm equipment, land, seed, fertilizer, [and] insecticide to the living quarters of the migrants is supplied by the defendants." *Id.* at 162. *See Lauritzen I*, 624 F. Supp. at 969. Although in *Brandel* the migrant furnished the pails, the *Brandel* court minimized this factor by saying that in pickle harvesting by hand there is no need for heavy capital investment by the worker, and the overall size of the investment by the employer relative to that by the worker is irrelevant. 736 F.2d. at 1118-19. To the contrary, we believe that the

migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants.

D. Degree of Skill Required

Although a worker must develop some specialized skill in order to recognize which pickles to pick when, this development of occupational skills is no different from what any good employee in any line of work must do. Skills are not the monopoly of independent contractors. *See Lauritzen I*, 624 F. Supp. at 969. The *Brandel* court found that a high degree of skill is involved in caring for the pickle plants and picking the pickles. 736 F.2d at 1117-18. We agree that some skill is required, but we do not find that this level of skill sets the pickle harvester apart from the harvester of other crops. The migrants' talent and their physical endurance in the hot sun do not change the nature of their employment relationship with the defendants.

E. Permanency

Another factor in the employment analysis is permanency and duration of the relationship. The Sixth Circuit in *Brandel* found that the vast majority of harvesters have only a temporary relationship with the employee which suggested to the court an independent contractural arrangement. *Id.* Many seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors. Many migrant families return year after year. In *Brandel* the returning migrant families comprised as

high a proportion as forty percent to fifty percent of the work force. *Id.* at 1117. In this case the district court found that the migrant workers did not have the sort of permanent relationship associated with employment. *Lauritzen I*, 624 F. Supp. at 969. Nevertheless, when the district court considered its finding in light of the economic reality of the parties' entire work relationship, the court did not consider this one criterion to be dispositive. Although we have serious doubts about this particular district court determination in view of cases such as *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985), we need not disturb that finding for the purposes of this case. We agree with the *Gillmor* court that however temporary the relationship may be it is permanent and exclusive for the duration of that harvest season. 535 F. Supp. at 162-63. One indication of permanency in this case is the fact that it is not uncommon for the migrant families to return year after year.

F. Harvesting as an Integral Part of Defendants' Business

Another factor we consider briefly is the extent to which the service of migrants may be considered an integral part of the pickle-picking business. The district court held that the migrants' work was an integral part of the business, as even the court in *Brandel* conceded. *Lauritzen I*, 624 F. Supp. at 969; *Brandel*, 736 F.2d at 1120. The defendant here takes a contrary view on appeal claiming that the record is insufficient to sustain the district court finding. It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business unless the employer's investment, planting, and cultivating activities are only

to serve the purpose of raising ornamental pickle vines. That result would likely disappoint all good pickle lovers.

G. Dependence of Migrant Workers

Our final task is to consider the degree to which the migrant families depend on the defendants. Economic dependence is more than just another factor. It is instead the focus of all the other considerations.

> The [other] tests are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is *dependence* that indicates employee status. Each test must be applied with that ultimate motion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently independent to lie outside its ambit.

Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1311-12 (5th Cir.) (emphasis in original), *cert. denied*, 429 U.S. 826 (1976). The district court held that the migrants were economically dependent on the defendants during the harvest season. *Lauritzen I*, 624 F. Supp. at 969. If the migrant families are pickle pickers, then they need pickles to pick in order to survive economically. The migrants clearly are dependent on the pickle business, and the defendants, for their continued employment and livelihood. *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385 (3d Cir.), *cert. denied*, 106 S. Ct. 246 (1985). That is why many of them return year after year. The defendants contend that skilled migrant families are in demand in the area and do not need the defendants. Were it not

for the defendants the migrant families would have to find some other pickle grower who would hire them. Until they found another grower, they would be unemployed. It is not necessary to show that workers are unable to find work with any other employer to find that the workers are employees rather than contractors.

We cannot say that the migrants are not employees, but, instead, are in business for themselves and sufficiently independent to lie beyond the broad reach of the FLSA. They depend on the defendants' land, crops, agricultural expertise, equipment, and marketing skills. They are the defendants' employees.

IV. CONCLUSION

No trial is needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers are employees, entitled to the protection of the FLSA. The purpose of the Act is to protect employees from low wages and long hours, and "to free commerce from the interferences arising from the production of goods under conditions that were detrimental to the health and well-being of workers." *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 727 (1971). In this case, for example, some children under twelve years of age are in the fields. Although there is no suggestion in the record that the defendants are abusing the children in any way, the child labor provisions of the Act are intended for their benefit. It may be that the defendants' pickle operation is exemplary and conducted pursuant to standards even higher than those of the FLSA, but that does not allow the defendants to circumvent the Act.

Neither does the defendants' gloomy prediction that application of the Act will have a devasting economic impact on the pickle business relieve them from complying with the Act's provisions. In any event, that argument is one for the Congress, not the courts. The basic arrangement between the defendants and the pickle pickers which, according to the defendants, produces the highest economic return for both grower and picker, need not be altered. All that need change is the label which the defendants apply to the arrangement. The defendants need only think of the proceeds paid to the pickle pickers as wages, keep the necessary records, and make sure they abide by the protections that the Act accords to working children.[7]

AFFIRMED.

EASTERBROOK, *Circuit Judge*, concurring. Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984), says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors"—each important, none dispositive. As the majority puts it: "Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling." Slip op. 8. Courts must examine "all the circumstances" in search of "economic reality." *Ibid.*

It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might de-

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[7] We acknowledge the brief of *amicus curiae* filed by Legal Action in Wisconsin, Inc., supporting the view that the migrant harvesters are employees, not independent contractors.

cide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision. The price of avoidance should be committing the decisions to the finders of fact, as our inability to fulfill Justice Holmes's belief that all tort law could be reduced to formulas after some years of experience[1] has meant that juries today decide the most complex products liability cases without substantial guidance from legal principles. Surely Holmes was right in believing that legal propositions ought to be in the form of rules to the extent possible. E.g., *Aguilera v. Cook County Police and Corrections Merit Board*, 760 F.2d 844, 847-48 (7th Cir. 1985). Why keep cucumber farmers in the dark about the legal consequences of their deeds?

People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns. Courts have had plenty of experience with the application of the FLSA

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[1] Oliver Weldell Holmes, Jr., *The Common Law* 111-13, 123-26 (1881).

to migrant farm workers. Fifty years after the Act's passage is too late to say that we still do not have a legal rule to govern these cases. My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of "economic reality" matter, and why.

I

Consider the problems with the balancing test. These are not the factors the *Restatement (Second) of Agency* § 2(3) (1958) suggests for identifying "independent contractors." The *Restatement* takes the view that the right to control the physical performance of the job is the central element of status as an independent contractor. My colleagues, joining many other courts, say that this approach is inapplicable because we should "accomplish the remedial purposes of the Act" (slip op. 7):

> Courts, therefore, have not considered the common law concepts of "employee" and "independent contractor" to define the limits of the Act's coverage. We are seeking, instead, to determine "economic reality."

This implies that the definition of "independent contractor" used in tort cases is inconsistent with "economic reality" but that the seven factors applied in FLSA cases capture that "reality." In which way did "economic reality" elude the American Law Institute and the courts of 50 states? What kind of differences between FLSA and tort cases are justified? A definition under which "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the

business to which they render service" (*Bartels v. Birmingham,* 332 U.S. 126, 130 (1947)) does not help to isolate the elements of "reality" that matter.

Consider, too, the seven factors my colleagues distill from the cases. The first is the extent to which the supposed employer possesses a right to control the workers' performance. This is the core of the common law definition. The parties agree that Lauritzen did not prescribe or monitor the migrant workers' methods of work but instead measured output, the weight and kind of cucumbers picked. Lauritzen did not say who could work but instead negotiated only with the head of each migrant family. Lauritzen did not control how long each member of the family worked. This absence of control over who shall work, when, and how, strongly suggests an independent contractor relation at common law. Cf. *United States v. Orleans,* 425 U.S. 807, 813-16 (1976) (lack of control over "detailed physical performance" establishes independent contractor status as a matter of law for purposes of the Federal Tort Claims Act). Perhaps Lauritzen could have dictated the workers' identities and methods, but inferences run in favor of the person opposing the motion for summary judgment.

My colleagues admit that the migrant workers controlled their own working hours and picking methods, but discount these facts on the grounds that what counts is Lauritzen's "right to control . . . the entire pickle-farming operation" (slip op. 11). If this is so, Pittsburgh Plate Glass must be an "employee" of General Motors because GM controls "the entire automobile manufacturing process" in which windshields from PPG are used. This method of analysis makes everyone an employee.

The second factor is whether the worker has an opportunity to profit (or is exposed to a risk of loss) through the application of managerial skills. My colleagues say that this indicates "employment" here because each worker has "invested nothing except for the cost of . . . work gloves, and therefore [has] no investment to lose" (slip op. 12). But the opportunity to obtain profit from efficient management is not the same as exposing a stock of capital to a risk of loss. (*That* subject is the third factor, discussed below.) A consultant analyzing the operation of an assembly line also may furnish few tools except for a stopwatch, pencil, and clipboard, but such a person unquestionably is an independent contractor. The "managerial" skill may lie in deploying a work force efficiently. The head of each migrant family decides which family members works, for how long, on what plot of land. That is the same sort of managerial decision customarily made by supervisors in a hierarchical organzation.

Third in my colleagues' list is the worker's investment in equipment or materials, that is, physical capital. The record is clear that the migrant wrokers possess little or no physical capital.[2] This is true of many workers we would call independent contractors. Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does

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[2] Physical capital is not, however, the same thing as a "disproportionately small stake in the pickle-farming operation" (slip op. 13). The laborers' share of the farm's gross income exceeds 50%, giving the migrant workers a very large stake indeed in the successful harvest and marketing of the crop. (The migrants receive 50% of Lauritzen's gross, plus housing and end-of-season bonuses.)

not imply that lawyers are "employees" of their clients under the FLSA.[3]

The fourth factor, whether the worker possesses a "special skill," would exclude lawyers and others rich in human capital. The migrant workers, by contrast, are poor in human capital, so this factor augurs for a conclusion of employment.

Fifth in the list is "the degree of permanency and duration of the working relationship." This can be measured, but it is hard to see why it is significant. Lawyers may work for years for a single client but be independent contractors; hamburger-turners at fast-food restaurants may drift from one job to the next yet be employees throughout. The migrant workers who picked Lauritzen's cucumbers labor on many different farms over the course of a year, but work full-time at the pickle operation for more than a month. Surely an engineering consultant who worked full-time on a given job, and frequently worked with a single manufacturer, but did five to ten jobs a year, would be an independent contractor. What matters for the migrant workers: that they have many jobs and float among employers, or that they work full-time for the duration of the harvest? Without a legal theory we cannot tell.

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[3] A story current among electrical engineers has it that after analyzing a destructive harmonic vibration in one of Edison's new generators, Prof. Steinmetz submitted an invoice for $5,000. An irate Edison demanded itemization. Steinmetz's new bill said:

1. Telling you to remove the third coil from the top $10.00

2. Knowing which coil to remove $4,990.00

Steinmetz, selling only expertise, was the paradigm of an independent contractor.

Factor number six, the "extent to which the service rendered is an integral part of the employer's business," is one of those bits of "reality" that has neither significance nor meaning. *Everything* the employer does is "integral" to its business—why else do it? An omission to pick the cucumbers would be fatal to Lauritzen, but then so would an omission to plant the vines or water them. An omission to design a building would be fatal to an effort to build it, but this does not imply that architects are the "employees" of firms that want to erect new buildings. Acquiring tires is integral to the business of Chrysler, but the tires come from independent contractors. Perhaps "integral" in this formulation could mean "part of integrated operation", which would distinguish tires but leave unanswered the question why the difference should have a legal consequence.

Seventh and finally we have "dependence." Economic dependence is more than just another factor. It is instead the focus of all the other considerations." Slip op. 14. The majority proceeds (*id.* at 15, citations omitted):

> The district court held that the migrants were economically dependent on the defendants during the harvest season. If the migrant families are pickle pickers, then they need pickles to pick in order to survive economically. The migrants clearly are dependent on the pickle business, and the defendants, for their continued employment and livelihood. That is why many of them return year after year. The defendants contend that skilled migrant families are in demand in the area and do not need the defendants. Were it not for the defendants the migrant families would have to find some other pickle grower who would hire them. Until they found another grower, they would be unemployed. It is not necessary to

> show that workers are unable to find work with any other employer to find that the workers are employees rather than contractors.

This is the nub of both the district court's opinion and my colleagues' approach. Part of it is factually unsupported. There is *no* evidence that the migrant families pick only pickles or are "dependent on the pickle business." For all we can tell, these families pick oranges in California, come to Wisconsin to pick cucumbers, and move on to New York to harvest apples. We know they work year-round, and cucumbers are not harvested year-round in the United States. The point of my colleagues' discussion of factors 2-4 is that these migrant workers are not specialized to pickles.

Now the families may be dependent on the pickle business once they arrive at Lauritzen's farm and settle down to work. If a flood carried away the cucumbers, the migrants would be hard pressed to find other work immediately. This, however, is true of anyone, be he employee or independent contractor. A lawyer engaged full-time on a complex case may take a while to find new business if the case unexpectedly settles. Migrant workers are no more dependent on Lauritzen than are sellers of fertilizer, who rely on the trade of the locality and are in the grip of economic forces beyond their control, and the person who fixes Lauritzen's irrigation equipment, a classic independent contractor. The conclusion of dependence in this case is an artifact of looking at the subject *ex post*—that is, after the workers are in the cucumber fields. To determine whether they are dependent on Lauritzen, we have to look at the arrangement *ex ante*.

The usual argument that workers are "dependent" on employers—frequently a euphemism for a concern about monopsony—is that they are immobile. The coal miner in a company town, the weaver who lives next door to one textile mill and 50 miles from the next, may be offered a wage less than the one that would be necessary to induce a new worker to come to town. The employer takes advantage of the family ties and other things that may fracture some labor markets into small regions, each of which may be less than fully competitive. Migrant workers, by definition, have broken the ties that bind them to one locale. They sell their skills in a national market. It is unlikely that they receive less than the competitive wage. That wage may be low—it will be if the skills they possess are common—and the FLSA may have something to say about that wage. It is not possible, however, to get to that conclusion by talking about "dependence." Lauritzen is dependent on migrant labor; he cannot move his farm, or change his crop after planting cucumbers. The workers, by contrast, can and will go elsewhere if Lauritzen offers too little money. The majority's observation when dealing with the fifth "factor" that families come back to Lauritzen year after year, and see 624 F. Supp. at 969, indicates that he offers a satisfactory return on their labor.

So the seven factors are of uncertain import in theory and cut both ways in practice. The list also is curious by its omission. It does not mention the method of compensation. One common feature of an independent contractor relation is compensation by a flat fee (common in the construction business) or a percentage of revenues (the sharecropper and the investment bank). The migrants who

picked Lauritzen's crop received more than half of the proceeds of the sales. True, piecework and commission sales are not inconsistent with status as an "employee," see *Rutherford Food Corp. v. McComb*, 331 U.S. 772 (1947); *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173 (7th Cir. 1987); *Silent Woman, Ltd. v. Donovan*, 585 F. Supp. 447 (E.D. Wis. 1984); but the wrinkle here is that the migrants share the market risk with Lauritzen. Each gets part of the sales price, which may rise or fall with the demand for pickles and the supply of cucumbers each season. If the price collapses, the workers and Lauritzen share the loss; so too they share the gain if the price rises. This is not an ordinary attribute of employment. Employees' "profit sharing" arrangements rarely provide for loss sharing. Why should this be irrelevant to the status of the migrant workers?

If we are to have multiple factors, we also should have a trial. A fact-bound approach calling for the balancing of incommensurables, an approach in which no ascertainable legal rule determines a unique outcome, is one in which the trier of fact plays the principal part. E.g., *Wisconsin Real Estate Investment Trust v. Weinstein*, 781 F.2d 589, 597-99 (7th Cir. 1986). That there is a legal overlay to the factual question does not affect the role of the trier of fact. See *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982) ("ultimate" questions); *Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986) ("mixed" questions). See also *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986) (applying Rule 52(a) standards to a determination that workers are "seamen" for FLSA purposes); *Brock v. Mr. W Fireworks*, 814 F.2d 1042, 1044

(5th Cir. 1987) (treating the definition of "employee" under the FLSA as one of fact). Given *Icicle* we cannot readily say, as my colleagues do (slip op. 10), that the "ultimate conclusion as to whether the workers are employees or independent contractors" is one of law. The drawing of inferences from subordinate to "ultimate" facts is a task for the trier of fact—if, under the governing legal rule, the inferences are subject to legitimate dispute.

II

We should abandon these unfocused "factors" and start again. The language of the statute is the place to start. Section 3(g), 29 U.S.C. § 203(g), defines "employ" as including "to suffer or permit to work". This is "the broadest definition '. . . ever included in any one act.'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), quoting from Sen. Hugo Black, the Act's sponsor, 81 Cong. Rec. 7657 (1937). No wonder the common law definition of "independent contractor" does not govern. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985). The definition, written in the passive, sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's asquiescence.

We have been told to construe this statute broadly. *Rutherford Food Corp; Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985). Knowing the end in view does not answer hard questions, for it does not tell us *how far* to go in pursuit of that end. *Rodriguez v. United States*, 107 S. Ct. 1391, 1393 (1987). "[A]lways the question about a 'remedial' statute is,

how much help was it intended to give the benefited group?'' *Moore v. Tandy Corp.*, 819 F.2d 820, 822 (7th Cir. 1987) (emphasis in original). See *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310-11 (7th Cir. 1986). To know how far is far enough, we must examine the history and functions of the statute.

Unfortunately there is no useful discussion in the legislative debates about the application of the FLSA to agricultural workers. This drives us back to more general purposes—those of the FLSA in general, and those of the common law definition of the independent contractor. Section 2 of the FLSA, 29 U.S.C. § 202, supplies part of the need. Courts are ''to correct and as rapidly as practical eliminate'', § 2(b), the ''labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers'', § 2(a). We recently summarized the purposes of the overtime provisions of the FLSA—which turn out to be the important ones here (in conjunction with the child labor provisions) in light of the parties' apparent belief that the migrant workers regularly earn more than the minimum wage. See *Mechmet*, 825 F.2d at 1176:

> The first purpose was to prevent workers willing (maybe out of desperation . . .) to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours. In particular, unions' efforts to negotiate for overtime provisions in collective bargaining agreements would be undermined if competing, non-union firms were free to hire workers willing to work long hours without overtime. The second purpose was to spread work and thereby reduce unemployment, by requiring the employer to pay a

> penalty for using fewer workers for the same amount of work as would be necessary if each worker worked a shorter week. The third purpose was to protect the overtime workers from themselves: long hours of work might impair their health or lead to more accidents (which might endanger other workers as well). This purpose may seem inconsistent with allowing overtime work if the employer pays time and a half, but maybe the required premium for overtime pay is intended to assure that workers will at least be compensated for the increased danger of working when tired.

To recite these purposes is not to endorse them, maybe, as Lauritzen says, the FLSA does more harm than good by foreclosing desirable packages of incentives (such as payment by reference to results rather than hours) or by reducing the opportunities for work, and hence the income of those, such as migrant farm workers, who cannot readily enter white-collar professions and make more money while working fewer hours. The system in place on Lauritzen's farm may be the most efficient yet devised—best for owners, workers, and consumers alike—but whether it is efficient or not is none of our business. The judicial function is to implement what Congress did, not to ask whether Congress did the right thing.[4] *Id.* at 1176.

The purposes Congress identified in § 2 and we amplified in *Mechmet* strongly suggest that the FLSA applies

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[4] Or whether, as seems likely, the parties can cope with a change in the legal rule. If the Act applies, Lauritzen can maintain a system of incentives tied to the price the cucumbers will fetch. The farm must keep records and ensure that the total payment exceeds the statutory minimum; if it does this, the FLSA is indifferent to the device by which the excess is determined.

to migrant farm workers. We also observed in *Mechmet* that the statute was designed to protect workers without substantial human capital, who therefore earn the lowest wages. No one doubts that migrant farm workers are short on human capital; an occupation that can be learned quickly[5] does not pay great rewards.

The functions of the FLSA call for coverage. How about the functions of the independent contractor doctrine? This is a branch of tort law, designed to identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries). To say "X is an independent contractor" is to say that the chain of vicarious liability runs from X's employees to X but stops there. This concentrates on X the full incentive to take care. It is the right allocation when X is in the best position to determine what care is appropriate, to take that care, or to spread the risk of loss. See *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938-39 (7th Cir. 1986); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984). This usually follows the right to control the work. Someone who surrenders control of the details of the work—often to take advantage of the expertise (= human capital) of someone else—cannot determine what precautions are appropriate; his ignorance may have been the principal reason for hiring the independent contractor. Such a person or firm specifies the outputs (design the building; paint the fence) rather than the inputs. Imposing liability on the person who does not control the execution of the work might induce pointless

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[5] The parties dispute whether "quickly" means days or only minutes, but the difference is unimportant for current purposes.

monitoring.[6] All the details of the common law independent contractor doctrine having to do with the right to control the work are addressed to identifying the best monitor and precaution-taker.

The reasons for blocking vicarious liability at a particular point have nothing to do with the functions of the FLSA. The independent contractor will have its own employees, who will be covered by the Act. Electricians are "employees" of someone, even though the electrical subcontractor is not the employee of the general contractor. Indeed, the details of independent contractor relations are fundamentally contractual. Firms can structure their dealings as "employment" or "independent contractor" to maximize the efficiency of incentives to work, monitor, and take precautions. Cf. *Moore;* Paul H. Rubin, *The Theory of the Firm and the Economics of the Franchise Contract,* 21 J.L. & Econ. 223 (1978). The FLSA is designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept $2.00 per hour, the agreement is ineffectual. See *Walton,* 786 F.2d at 305-06. In other FLSA cases we have looked past the contractual terms. E.g., *Mechmet,* 825 F.2d at 1177 ("[w]e attach no weight to the fact that the collective bargaining agreement between the Ritz-Carlton and its waiters describes the waiters' income from the service charge as a 'gratuity' rather than a 'commission.' "). In this sense "economic reality" rather than contractual form is indeed dispositive.

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[6] If the parties could re-contract at no cost about the allocation of damages, of course, it would produce no change at all if both parties were solvent. R.H. Coase, *The Problem of Social Cost,* 3 J.L. & Econ. 1 (1960).

The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health, are valuable traits and all too scarce. Those who possess these traits will find employment; those who do not cannot work (for long) even at the minimum wage in the private sector. But those to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health. So the baby-sitter is an "employee" even though working but a few hours a week, and the writer of novels is not an "employee" of the publisher even though renting only human capital. The migrant workers labor on the farmer's premises, doing repetitive tasks. Payment on a piecework rate (e.g., 1¢ per pound of cucumbers) would not take these workers out of the Act, any more than payment of the sales staff at a department store on commission avoids the statute. The link of the migrants' compensation to the market price of pickles is not fundamentally different from piecework compensation. Just as the piecework rate may be adjusted in response to the market (e.g., to 1¢ per 1.1 pounds, if the market falls 10%), imposing the market risk on piecework laborers, so the migrants' percentage share may be adjusted in response to the market (e.g., rising to 55% of the gross if the market should fall 10%) in order to relieve them of market risk. Through such adjustments Lauritzen may end up bearing the whole market risk, and in the long run must do so to attract workers.

There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA—without regard to the

crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort. Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Docket Number 84-C-980

WILLIAM E. BROCK

v.

MICHAEL LAURITZEN, *et al.*

Terence T. Evans, District Judge

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedure.

( ) Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came on for consideration before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants are enjoined from future violations of the Fair Labor Standards Act and this action is dismissed.

SEP 30 1986

Clerk: Sofron B. Nedilsky Date: 9/30/86

(By) Deputy Clerk: Regina J. Torcivia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedure.

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,

Plaintiff,

v. Civil Action No. 84-C-980

MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITZEN FARMS,

Defendants.

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DECISION AND ORDER

(Filed September 30, 1986)

Currently several motions are pending in this action, brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*

On December 20, 1985, I granted the motion of the Secretary of Labor for partial summary judgment, determining that the migrant workers who pick cucumbers at defendants' farm were employees of the defendants—rather than independent contractors—and thus were within the protection of the Act.

Eight months later, on August 14, 1986, defendants moved for relief from judgment pursuant to Rule 60(b)(6) of the Fed. R. Civ. P. The Secretary opposes the motion, claiming that the motion is being used as a sub-

stitute for appeal, that defendants have not met the requirements of relief pursuant to Rule 60(b)(6), and that in any case, the motion is simply a rehash of the arguments presented earlier in connection with the motion for partial summary judgment.

Rule 60(b) provides for extraordinary relief only in exceptional circumstances. *McKnight v. U.S. Steel Corp.*, 726 F.2d 333 (7th Cir. 1984). Here, the defendants have clearly failed to meet those circumstances. In addition, the motion is merely a repetition of arguments previously considered. The motion is denied.

The Secretary has moved to amend the complaint to add a corporation newly formed by defendants Michael and Marilyn Lauritzen, and to remove the question of back wages from this litigation. The motion is unopposed. In addition, at the deposition of Michael Lauritzen on July 1, 1986, counsel for defendants indicated that if the Secretary wanted a stipulation to "clean up [the] pleadings" he would agree (p. 10). The motion is granted.

Several individuals who have worked on Lauritzen Farms on at least one occasion since 1982 have moved to intervene in this action as party defendants pursuant to both Rule 24(a) and (b)—intervention as of right and permissive intervention. The Secretary opposes the motion on the basis that the application is untimely; that the persons do not have a protectable interest in the litigation; that any interest they arguably have is adequately protected by the existing parties; and that the proposed intervenors have no claim to defense in common with the main action.

The proposed intervenors have failed to meet the requirements for intervention—either permissive or as of right. The application is untimely. In addition, the interest of the proposed intervenors is—as they state—to protect their status as independent contractors with Lauritzen Farms. That interest is identical to the interest so vigorously propounded by the defendants to this action. Common sense—which is not always irrelevent in these matters—also indicates that the interest of the proposed intervenors is identical to the defendants: they are represented by defendants' attorney, who could hardly be expected to represent interests not like those of the defendants. The motion to intervene is denied.

The Secretary of Labor has moved for partial summary judgment and immediate injunctive relief. Because the motion to amend the complaint removing back wages from this case has been granted, the motion is actually a motion for summary judgment on all the remaining issues in this action.

The undisputed facts, primarily taken from the deposition of defendant Michael Lauritzen on July 1, 1986, are as follows. The defendants have been engaged individually and as partners and, subsequent to August 22, 1984, as a Wisconsin corporation, in the operation of farms in Waupaca and Waushara Counties in Wisconsin. They have employees engaged in the production of goods for commerce, particularly cucumbers and other produce, and have had employees handling goods moved in interstate commerce During each of the years in question, the defendants have had a gross volume of sales of not less than $250,000.

The harvest season on the Lauritzen farms begins each year about July 20 and ends approximately on Labor Day. Each year the defendants use approximately 40 or more migrant families to harvest their cucumbers. They have used more than 500 man days of agricultural labor in at least one quarter of a calendar year in each year since at least 1981. Lauritzen is familiar with the Minimum Wage and Child Labor provisions of the Fair Labor Standards Act, and has been since at least 1972.

Beginning with the 1984 season, the defendants stopped keeping any records of hours worked by the cucumber harvesters. Sometime before 1984, they ceased keeping records showing the names and ages or birth dates of all members of ~~each family~~ group. In addition, Lauritzen refuses to obtain such information in the future or keep any records of that sort of information. He has failed and refuses to determine the number of workers in each family group who work each day, and he says that he will not do so in the future. He has failed to determine the number of hours worked by each worker, and refuses to do that in the future. Lauritzen is aware that minors are present from time to time in his fields. He has failed, however, to determine whether minors younger than 18, and particularly younger than 12, are harvesting cucumbers. He states that he will not keep those records in the future. The workers who harvest the Lauritzen cucumbers, with rare exceptions, do not commute daily from their own permanent residence to the farms.

Lauritzen has refused in the past to guarantee the minimum wage to his workers. He does not instruct families not to bring their children in the field, nor does he

intend to prohibit children under 12 from harvesting cucumbers. He refuses to guarantee the minimum wage to the harvesters in the future, and states that he does not intend to make up the difference if his workers do not earn $3.35 per hour.

On the basis of these undisputed facts, the Secretary of Labor contends that an injunction is appropriate under 29 U.S.C. § 217. The Secretary contends that injunctive relief is appropriate where there is inadequate assurance of future compliance with the Act. The defendants state in opposition to the motion that they have not in the past willfully violated any of the provisions of the Fair Labor Standards Act in that they at all times had a good faith belief that they were not an employer under the Act. They contend that there is no proof that they are in violation of the Minimum Wage and Child Labor provisions. They state their willingness, however, to comply with an injunction if one is entered. Finally, they argue that the Secretary will not be prejudiced if the injunction is not issued immediately, and that a decision on the injunction should await a decision on the motion of the migrant families to intervene in this action.

29 U.S.C. § 217 provides the district courts with jurisdiction to restrain violations of the Act. An injunction can be granted under the Fair Labor Standards Act if the Secretary of Labor has established violations of the Act. *Hayes Bros., Inc. v. Economy Fire & Casualty Co.*, 634 F.2d 1119 (8th Cir. 1980). In addition, an injunction is appropriate when there are inadequate assurances that a party subject to the provisions of the Act will comply with the Act in the future. *Dunlop v. Davis*, 524 F.2d 1278

(5th Cir. 1975). *Beneficial Finance Co. v. Wirtz,* 346 F.2d 340 (7th Cir. 1965).

Here, the defendants have no longer any good faith defense to the action. I determined, on December 20, 1985, by written decision, that the workers at the Lauritzen farm were employees within the protection of the Act. Since that time, at the deposition on July 1, 1986, Michael Lauritzen has stated quite unequivocally that he does not intend to comply with the provisions of the Act.

Accordingly, there is little choice here but to enjoin the defendants from future violations of the Fair Labor Standards Act. Because the back wage claims have been dropped from this action, the issuance of the permanent injunction closes the case. The Clerk of Court will enter an injunction on this date enjoining the defendants from violating the Fair Labor Standards Act.

SO ORDERED at Milwaukee, Wisconsin, this 30 day of September, 1986.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITZEN FARMS,

Defendants.

Civil Action No. 84-C-980

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedure.

DECISION and ORDER

(Filed Dec. 20, 1985)

This case is before me on the Secretary of Labor's motion for partial summary judgment. The Secretary seeks a declaration that as a matter of law, the migrant farm workers involved in this case were employees of Lauritzen Farms. Lauritzen argues that the workers, who pick cucumbers during the harvest season, are independent contractors not employees. Analyzing the relevant factors, I believe that the migrant workers were Lauritzen's employees as a matter of law and therefore, that they are within the protections of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*

The material facts in this case with reference to the question presented are largely undisputed. Lauritzen is a farmer who grows cucumbers intended for pickling in Waupaca and Waushara, two Wisconsin counties. These cucumbers, or pickles, as they are often called, are not his

only crop, but he plants between 100 and 330 acres per year. Lauritzen owns all or most of the land upon which the cucumbers are grown. He determines the type of seed to use in planting and carries out the planting with the help of employees who are paid at the hourly minimum wage. Lauritzen and his employees are responsible for fertilizing and irrigating the crops prior to and throughout the harvest season. Lauritzen is also responsible for the application of pesticides and herbicides to the crops prior to and during the harvest season.

When the harvest season commences, the cucumbers are handpicked by migrant workers. The process is simple: the workers pull the cucumbers off the vine. The harvest season lasts for a month of two, and during that time the same vines are harvested several times. The largest cucumbers are picked first in order to encourage more to grow. Cucumbers which are picked at a smaller size are worth more money because they are better suited to pickling. The migrant workers, therefore, pick the largest cucumbers first, then wait for more to grow and pick them when they reach the appropriate size. The workers thus control their hours to the extent that they are waiting for the cucumbers to reach the appropriate size for picking. The workers determine when the pickles have reached the appropriate size.

Cucumber picking does not require a great deal of equipment. The migrant workers use gloves for picking which they provide for themselves. Some workers also provide rubber trousers and capes for working in wet conditions. The other necessary equipment is a pail in which to place the pickles that have just been picked, a sack

in which to place the pickles at the end of the day, and a truck into which the sacks are loaded and driven to the sorting station. The pails, sacks, and trucks are all owned by Lauritzen. Lauritzen also owns the sorting station in which the cucumbers are sorted for the processor who will purchase them.

The price for which the cucumbers are sold is determined by Lauritzen and the pickle processors. This price is set at the beginning of the season. The migrant workers have no control over the price which the processors and Lauritzen agree to buy and sell the cucumbers for. The migrant workers, therefore, control how much money they make solely by the amount and the sizes of cucumbers they pick.

The harvesting of cucumbers begins in July and lasts until approximately early September. Each year migrant worker families arrive at Lauritzen's farm from different parts of the United States. Some of the families working for Lauritzen have worked for him on an annual basis for six or seven years, while some may only come once or twice. The migrant workers provide their own transportation to Wisconsin and are not reimbursed for this expense by Lauritzen.

Once they arrive at Lauritzen Farms, the migrant workers are assigned a house by Lauritzen. They are provided with these houses free of charge (although some labor contracts called for a $30.00 weekly payment if the worker did not earn the weekly minimum wage) and regular workers are generally assigned the same house from year to year. Lauritzen also assigns each family a section of cucumber vines to harvest. The head of each family

informs Lauritzen how much acreage they can harvest and Lauritzen assigns them the appropriate number of rows. Upon arrival, the head of each migrant family signs a "Migrant Labor Worker Agreement/Contract" with Lauritzen. The agreement does not always name all of the family members who will be working in the fields. Minor children do not sign separate agreements, although adult children may do so. The agreement sets forth the applicable wage rate as "50% 3.35 P.H." This means that workers are to be paid 50% of the gross receipts received for the cucumbers picked. The 3.35 corresponds to the minimum wage prescribed by the FLSA, and appears to be a guarantee of the minimum wage during weeks where 50% of gross receipts is insufficient to provide the minimum wage to all workers. The agreement also provides for a work guarantee of 45 hours per 2-week period and identifies the workers as migrant labor contractors instead of employees.

When signing the agreement, family heads are generally given a sheet which sets forth six grades of cucumbers and the price that Lauritzen is purportedly to be paid by processors for each grade. The prices are set forth by hundredweight, and in 1984 ranged from $3.00 per hundred pounds for the largest acceptable pickles to $22.00 per hundred pounds for the smallest. Workers are paid by the rate of 50% of the purported gross receipts regardless of whether Lauritzen actually sells all of his pickles. So, if a processor declines to purchase certain pickles, the migrant workers are nevertheless paid according to the price list.

Some workers arrive one or two weeks before the cucumber harvest season is ready to commence. These

workers are often permitted to live in Lauritzen's houses and work for other local farmers. Once the cucumber harvest begins, however, the cucumbers demand the workers' full attention and workers do not work for other farmers.

During the harvest season, Lauritzen regularly visits his fields. According to most of the migrant workers deposed, Lauritzen has the power to fire them if he chooses. None of them could remember, however, a situation in which Lauritzen had asked a family to leave. Lauritzen denies that he exercised control or supervision over the migrant workers; he specifically stated that decisions with respect to agricultural husbandry practices, or when and what to pick are decisions made by the migrant family.

The decision as to whether workers are employees or independent contractors is based upon the individual facts or a case. However, this question is fundamentally a question of law, highly appropriate for decision on summary judgment. *Beliz v. W.H. Lloyd & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985). "Employee" is a term to be liberally construed in order to accomplish the remedial purposes of the FLSA; one such purpose is the cessation of payment of sub-minimum wages. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). In determining whether a worker is an employee or an independent contractor, courts should consider the degree of control which an employer has over the manner in which work is performed, the opportunities for profit or loss dependent upon the managerial skill of the worker, the worker's investment in equipment or material, the skill required, the permanence of the working relationship, and whether the service rendered is an integral part of the alleged em-

ployer's business. *Real v. Driscoll Strawberry Associates, Inc.,* 603 F.2d 748, 754 (9th Cir. 1979); *United States v. Silk,* 331 U.S. 704 (1947). None of these factors is determinative; rather, all must be weighed in order to decide the economic realities of the situation. Central to the court's decision is whether the worker is economically dependent upon the business to whom he renders services. *Usery v. Pilgram Equipment Co., Inc.,* 527 F.2d 1308, 1311 (5th Cir. 1976).

The facts of this case support a finding that the workers are employees. First, the workers have little control over the labor process. They do not determine the manner in which seed is planted, fertilized, irrigated, or dusted. They do determine their working hours but within the confines of a crop which must be harvested when it reaches a certain size. The crop itself fundamentally determines their working hours. Moreover, workers are supervised, however minimally, by Lauritzen. Lauritzen also holds the power to discharge workers, although apparently this has not been exercised.

Second, the workers have little opportunity for profit or loss based upon their managerial skills. Workers' earnings are based upon the amount and grades of the cucumbers picked. "'Profit' is the gain realized from a business over and above its expenditures. [Citation omitted.] The only 'expenditures' from which the . . . [workers] obtain a return is their own labor . . ." *Silent Woman, Ltd. v. Donovan,* 585 F. Supp. 447, 451 (E.D. Wis. 1984). Like Judge Myron Gordon of this district in the *Silent Woman* case, I believe that the return on labor is appropriately classified as wages not profit. *Id.* Furthermore,

the workers are paid for the cucumbers picked regardless of whether Lauritzen sells them to a processor; thus, they bear little risk of loss. Lauritzen argues that the workers are risking losses in that they pay for their own transportation to Wisconsin and might risk a bad harvest. This, however, is a common risk undertaken by many migrant agricultural workers and is not the type of investment-related risk which can properly be related to a worker's managerial skills.

Third, the migrant workers have virtually no investment in equipment or material. Their sole expenses consist of providing transportation and gloves for themselves and their families. Everything else, from housing to sacks, is provided by Lauritzen.

Fourth, little skill is required in the hand harvest of cucumbers. I do not dispute Lauritzen's statement that workers become more efficient pickers with more experience; this process occurs in almost all jobs. I doubt that it takes a great deal of skill to learn when cucumbers are the proper size to be picked and then pull them off the vines.

Fifth, the migrant workers do not have a permanent relationship with Lauritzen, although many return from year to year. Migrant workers are by definition temporary; they are employed for the duration of a specific harvest. This alone does not make them specialists or independent contractors. Lauritzen additionally argues that both he and the migrant workers regarded the workers to be independent contractors, and that they intended to establish this relationship through the migrant labor contract. I am not willing to give the parties' state of mind

great weight in a case such as this where the totality of the circumstances point strongly to an employer-employee relationship.

Finally, I find that the service rendered by the migrant workers is an integral part of Lauritzen's business. Without harvest workers, Lauritzen's crops would rot on the vine. The workers in this case are economically dependent upon Lauritzen's business for their work during the cucumber harvest season; the fact that they may have other seasonal employment in no way mitigates their temporary economic dependence upon Lauritzen's business. The economic realities of this situation are those of an employment relationship.

In reaching my decision I note that many courts have found migrant farm workers to be employees within the meaning of the FLSA. *See e.g. Beliz v. W.H. McLloyd & Sons Packing Co., id.*, 765 F.2d 1317; *Real v. Driscoll Strawberry Associates, Inc., id.*, 603 F.2d 748; *Hodgson v. Griffin & Brand & McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1974), *cert. denied*, 414 U.S. 819; *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973); *Donovan v. Gillmor*, 535 F. Supp. 154 (N.D. Ohio 1982). In reaching my decision I am also mindful of the recent decision by the United States Court of Appeals for the Sixth Circuit in *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984). The *Brandel* court held that agricultural workers who rowed and blocked cucumber vines and then picked the cucumbers were independent contractors. The *Brandel* workers, like Lauritzen's workers, contracted to receive 50% of the gross receipts. They were minimally supervised by the farmer, had little opportunity to increase their profit, other than through picking the right cucumbers, and had a minimal

investment in equipment, purchasing only pails and gloves. The court relied on these factors, even though it also found that there was little evidence to support the district court's conclusion that the workers were exposed to a risk of loss, and in spite of their finding that the harvest was an integral part of the farmer's business. I disagree with the *Brandel* case because I believe that it disregarded the economic reality of migrant cucumber pickers. The economic realities of this case make the pickers completely dependent upon Lauritzen who plants and cares for the crops, determines the selling price, and provides them with housing. The workers are exposed to little risk, their work requires little skill and almost no investment, and provides little opportunity for profit or gain. I therefore hold that the migrant workers who harvested cucumber for Lauritzen during 1982 to 1984 were employees within the Fair Labor Standards Act. Accordingly, the Secretary's motion for partial summary judgment is GRANTED.

A conference call to schedule proceedings to conclude this case is set for January 21, 1986, at 8:30 a.m.; this call will be initiated by the court.

SO ORDERED at Milwaukee, Wisconsin, this 20 day of December, 1985.

BY THE COURT:

/s/ Terence T. Evans
TERENCE T. EVANS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF WISCONSIN

RAYMOND J. DONOVAN, Secretary of Labor United States Department of Labor, Plaintiff	)	
v.	)	CIVIL ACTION File No. 84-C-0980
MICHAEL LAURITZEN and MARILYN LAURITZEN individually and doing business as LAURITZEN FARMS. Defendants	)	

Affidavit in Opposition to Secretary of Labor's Motion for Partial Summary Judgement

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUSHARA)

The undersigned, each being duly sworn, deposes and says:

1. That each is an adult resident of the United States.

2. That the facts set forth here in are of each deponent's personal knowledge; that each fact would be admissable at trial of the above cause; that each deponent is competent to testify with respect to such facts if called as a witness so to do.

3. That each of the deponents has here to forth given a deposition in the above captioned matter, doing so either on March 12, 1985 or August 31, 1984; that each deposition was taken with the use of an interpreter but that to deponent's knowledge the interpreter was not familiar with the migrant boarder dialect, sometimes called "Tex-Mex", and that as a result there of misunderstandings of both questions and answers may have occurred in each deposition.

4. That regardless of what may appear from the deposition of each deponent to the extent the deposition contradicts or is inconsistant with the facts here in after set forth, the deposition is in error, undoubtedly so because of misunderstandings of questions asked or answers given.

5. That each deponent intended and believes that the deponent's relationship with Lauritzen Farms is, and at all times was, that of an independent businessman or contractor and not one of an employee.

6. That each deponent and family contracted with Lauritzen Farms to hand harvest the pickle crop from a parcel of farmland over which the deponent and family had and exercised exclusive possession and control.

7. That as to each deponent's parcel of land, the harvest process was handled exclusively by deponent and family and at all times without supervision, direction or control from Lauritzen Farms or any of its agents or employees; that all decisions made with respect to the harvest process of what to do, when to do and how to do were determined solely by deponent and family.

8. That the parcel of land harvested by deponent and family was selected by deponent, or by a member of de-

ponent's family, from available parcels not previously selected by other harvesters.

9. That while the physical act of picking a pickle is the simple act of reaching, the process of hand harvesting pickles so as to maximize income requires a skill and expertise which can only be learned and developed over one or more complete harvest seasons; that the care of the pickle plants during the harvest season so as to maximize the number of pickings, the selection of grade so as to maximize profits, the knowledge of when to pick for quality and grade yields—these and other skills and knowledge necessary for increased earnings cannot be learned in hours or days; that effort and hard work, by itself, has little effect on increasing earnings; that "what" and "when" is as important as "how".

10. That none of the deponents was paid or guaranteed a minimum wage or minimum level of income; that the sole compensation of each deponent and family with respect to the Lauritzen Farm pickle harvest is the 50% or more of the sales proceeds paid each deponent and family for the crop they harvested, that in the case of skilled harvesters, when measured by the hours worked by a family member, 50% of the sales proceeds will greatly exceed both Federal and State minimum wage specifications.

11. That the children of the deponent, and of deponent's family, help during the pickle harvest only on the parcel being harvested by their family, and that the children work for no one other than their parents.

12. That each deponent and family harvest only pickles for Lauritzen Farms and does not harvest nor is

employed by Lauritzen Farms with respect to any other crop; that each deponent harvests pickles for Lauritzen Farms because deponent wishes to do so, but that deponent and family would have no difficulty at any time contracting or working elsewhere should deponent so desire.

13. That the word "boss" is a general term often used by migrants to denote persons other than employers and its use by deponent is not meant to describe an employer-employee relationship.

14. Each deponent signed a Migrant Labor Worker Agreement/Contract required by the Wisconsin Department of Industry, Labor and Human Relations, but that each did so solely because they were advised that they were required so to do in order to work in Wisconsin and not because they considered themselves employees of Lauritzen Farms.

15. That it is not uncommon for a family harvesting pickles for Lauritzen Farms to harvest pickles, or perform other work, for other farmers in the area.

16. Further each deponent sayth not.

Sworn and subscribed to this 3 day of September, 1985.

/s/ Jose Contreras	9-3-85	/s/ Jose Delgado Jr.	9-3-85
Jose Contreras	Date	Jose Delgado Jr.	Date
/s/ Erasmo Garces	9/3/85	/s/ Epigmenio Trevino Jr.	9/3/85
Erasmo Garces	Date	Epigmenio Trevino Jr.	Date

Before me personally appeared Jose Contreras, Jose Delgado Jr., Erasmo Garces, and Epigmenio Trevino Jr., and under oath each swore and affirmed that the facts set forth above are true of the personal and individual knowledge of each this 3rd day of September, 1985.

/s/ Charles Rosuauah
Notary Public State of Wisconsin
My commission expires 10-19-86.

UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF WISCONSIN

RAYMOND J. DONOVAN, Secretary of Labor United States Department of Labor Plaintiff	)	
v.	)	File No. 84-C-0980
MICHAEL LAURITZEN and MARILYN LAURITZEN individually and doing business as LAURITZEN FARMS, Defendants	)	

Affadavit in Opposition to Secretary of Labor's Motion for Partial Summary Judgement

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUSHARA)

The undersigned, Michael Lauritzen, being duly sworn, deposes and says:

1. That deponent is an adul[illegible] resident of the state of Wisconsin; that he is a defendant in these proceedings; that the facts set forth here in are of his personal knowledge and would be admissible at trial of the above cause; that deponent is competent to testify with respect to such facts if called as a witness so to do.

2. That deponent makes this affadavit in opposition to plaintiff's motion for partial summary judgment here

to fore filed in this cause, intending to demonstrate that a genuine dispute exists as to those material facts necessary for an adjudication of the issues involved.

3. That deponent is and has been since 1967, a multi-crop farmer, one of the crops being pickles destined for the process market. Depending upon the year and the dictates of the pickle crop, deponent will plant approximately 100 to 330 acres of pickles.

4. At the commencement of each agricultural season, deponent contracts with a processor. The processor will have established at such times, in unilateral fashion, the price it will pay to any and all growers for specific grades of pickles. The processor, depending upon its contractual commitments with its customers, establishes the seed varieties and acreage to be planted by each grower with whom it contracts. If a grower takes exception to the processors determinations, the growers sole recourse is to contract with another processor or to grow for the fresh market.

5. Pickles grown for the fresh market and pickles grown for the process market, where considerations of grade and quality become major price factors, are distinctly and separate farming operations.

6. Pickles grown for the process market are, of necessity, hand harvested. Prices vary with grade; grade is a function of size. Care of the fields, proper treatment of vines during the harvest process, and the time of picking bear directly upon and determine the number of pickings available from a vine. Pickles allowed to ripen for too long a period will drain the substance from the vines

thereby retarding the number of subsequent pickings. The maximum revenue to be derived from a vine is a function of daily analysis of grade size and market price per grade so as to obtain the maximum gross revenues and maximum pickings from a particular vine.

7. Deponent prepares the soil, plants and cultivates the pickles. In deponent's geographical area, irrigation is a necessity for a successful pickle crop. Irrigation, in the instance of deponent's farming operation, is accomplished by a center pivot irrigation system, a system that swings from a center point in a large circle irrigating large numbers of acres in a single rotation. Liquid fertilizer and herbicides are applied directly to the pickle plants through the irrigation process.

8. Because of the judgemental aspects involved in harvesting pickles by grade; because all pickles do not ripen or come to size at the same time; because the quality of preterminative care of the pickles and the techniques of harvest can drastically affect both the quantity and quality of yield, both deponent and the Wisconsin process pickle industry have practiced for many years a program of hand harvest where the responsibility for the preharvest care of the crop and the harvest itself is contractually delegated to skilled migrant families. These families assume the total responsibility for the harvest in exchange for an agreed percentage of the gross proceeds derived from the sale of the pickles they harvest. Under deponent's contractual relationships with migrant families the percentage is 50% except in the last week of the harvest season when the percentage allocated to the migrant family is increased beyond 50%. The industry has attempted to harvest in

pryor years under programs that compensated by the hour or by the unit, but these methods have been abandoned as destructive of quality yields and, thus, not tending to maximize revenues. In fact, the more skilled migrant families refuse to harvest pickles unless the harvest process is accomplished through a contractual relationship. Those families contracting with deponent for the harvest process are free to contract with or work for other growers in the area, and in fact, many migrant families do so.

9. At the time deponent and a migrant family contract together, the migrant family selects from the acreage planted to pickles, and yet unassigned, that acreage in a given location the migrant family feels it can harvest to maximize income. From that point on the harvest process is the sole responsibility of the migrant family. Deponent does not exercise control or supervision over the harvest process nor is deponent contractually capable of so doing. All decisions with respect to agricultural husbandry practices, and when to pick, and what to pick are decisions made by the migrant family. Because the process of irrigation encompasses many acres in a single irrigation, of necessity, the question of when to irrigate becomes a consensus decision made by deponent and all of the migrant families that will be effected by the swing of the irrigation system.

10. Proceeds from the sales of the pickle harvest are, in the care of deponent, divided equally between deponent and the migrant family, except, as previously noted, sales proceeds generated during the final week of the harvest season, when the migrant family receives a greater percentage of the total proceeds. Depending upon the experi-

ence, skill and managerial ability of the migrant family, comparative earnings vary greatly among families.

11. Gross proceeds are not to be mistaken with piece rate. The latter is a method of payment depending solely upon volume. It is a method of payment not used in the process pickle industry because of its destructive impact on gross receipts.

12. The skills necessary to maximize revenues in the hand harvest of pickles, extend far beyond the physical act of picking and requires the experience of several seasons to develop adequate competency. If there are no sale proceeds, there is no compensation to the migrant family. No guarantees of income exist. The migrant family and deponent are equally at risk with respect to weather, insects, and blight, and the market place. The hand harvest of pickles is a process that requires judgement and experience more merely than the application of tools and equipment.

13. Deponent utilizes the services of migrant families only with respect to the harvest of the pickle crop. Each of the deponents other crops are either "pick-your-own" or machine harvested. The migrant families are contracted with from year to year if a relationship has proven truly to be, financially speaking, mutually satisfactory. The demand for skilled migrant families exceeds the supply and there is a great deal of mobility among and between migrant families and the various growers in the geographic area where deponent farms. No contractual relationships exists between deponent and the migrant family for more than a single harvest season.

14. It is increasingly becoming the practice, both with deponent and all of agriculture, that the farming process is divided into distinct and separate phases with the separate phases being contracted by a farmer to "outside" or independent contractors for performance. Illustrative of this process is the use of the crop duster and the contract plower in lieu of self performance of these functions by the farmer. In pickles the harvest process is a phase of pickle farming that has, as above noted, been separated and contracted for its performance with parties other than the farmer.

15. Housing is provided to the migrant families without rental charge as an incentive to obtain skilled families. Since the housing varies in size of accomodations, assignments to housing are made by comparing family size with accommodations available.

16. Upon occasion the contractual arrangements between deponent and the migrant family are oral and upon occasion they are written. Attached as exhibit A is a sample contract entered into between deponent and a migrant family for the harvest season of 1984.

17. Deponent and the migrant family have been instructed by local authorities that they are each required by Wisconsin law to execute a "Migrant Labor Worker Agreement-Contract". In accordance with these directives such documents have been executed but deponent considers such documents to be non consequential to the practice of his farming operation. Deponent does not consider these documents reflect or describe the nature of the relationship that in fact exists between deponent and the migrant

family with whom he contracts. Deponent does not consider himself bound to the terms thereof.

18. Deponent denies as a matter of fact in the allegations that the migrant families with whom he contracts are economically dependent upon deponent or deponent's farming operation. Rather, deponent contends, it is deponent that is economically dependent upon the availability of skilled migrant families. Deponent denies as a matter of fact that he supervises or directs the harvest process or that he has the right or authority so to do. Deponent denies as a matter of fact allegations that the earnings of a migrant family are not dependent upon skill, experience and managerial ability but a result only through physical labor. Deponent denies as a matter of fact that a permanent employment relationship exists between deponent and a migrant family.

19. Further, deponent sayth not.

Sworn and subscribed to this 27 day of September, 1985.

Michael Lauritzen 9-27-85
/s/ Michael Lauritzen Date

Before me personally appeared Michael Lauritzen and under oath swore and affirmed that the facts set forth above are true of the personal and individual knowledge of Michael Lauritzen this 27th day of September, 1985.

/s/ Ardene P. Hansen
Notary Public State of Wisconsin
My commission expires 9-3-89.

UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF WISCONSIN

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor, Plaintiff, vs. MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITIZEN FARMS, Defendants.	)	CIVIL ACTION FILE NO. 84-C-09[illegible]

Affidavit in Support of Defendant's Motion For Relief From Judgment and In Support of Motion to Intervene as Party Defendants

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUSHARA)

The undersigned, each being duly sworn, deposes and says:

1. That each are adult residents of the United States, but of States other than the State of Wisconsin; that upon at least one occasion since 1982 each Deponent has traveled, at his own expense, to the State of Wisconsin, and entered into a contractual relationship with Lauritzen Farms to assume the entire responsibility, as an independent contractor, for the hand harvest of a pickle crop from a specified area of land owned or leased by Lau-

ritzen Farms; that the harvest period involves a span of approximately 50 days annually, commencing about the 20th of July.

2. That Deponents are among those alleged by the Secretary of Labor in above entitled cause to have been employees of Lauritzen Farms and with respect to whom it is alleged that Lauritzen Farms has violated certain provisions of the Fair Labor Standards Act.

3. That during the last week or so of the harvest season of 1985, Deponents generally became aware that the Secretary of Labor had commenced suit against Lauritzen Farms contending that Deponents and others who contracted with Lauritzen Farms to hand harvest pickles were employees of Lauritzen Farms and not independent contractors. Upon their return to Wisconsin in mid-July of 1986, Deponents learned the Court had disposed of, without trial, the issues of Deponents' status as employees of Lauritzen Farms; that Deponents are acquainted with the text of the Court's Decision and Order entered December 20, 1985, it having been read and explained to all Deponents by those Deponents fully capable with both the English language and the dialect of Deponents.

4. That Deponents contend their relationship with Lauritzen Farms is that of an independent contractor for the hand harvest of pickles; that Deponents comprise 11 contracting entities of the approximate 70 entities presently contracting with Lauritzen Farms for the 1986 hand harvest of pickles; that while the matters set forth in this affidavit are of Deponent's personal knowledge, from their discussions with other contracting entities each Deponent believes that the facts represented herein would

be so represented by all contracting entities. The facts set forth herein are true of each Deponent's knowledge and each could and would competently testify to the same if called as a witness so to do.

5. That each Deponent executes this affidavit in support of the Motion for Relief from Judgment and to support the motion of those seeking to intervene in this cause as party defendants; that this affidavit, executed collectively by all Deponents, was read and explained to them in their dialect by Deponents proficient in English and each Deponent understands the text thereof and intends its meaning.

6. That each Deponent is aware that the Decision and Order of the Court factually described the nature of the relationship between Lauritzen Farms and Deponents in the following manner:

> (a) "When the harvest season commences, the cucumbers are handpicked by migrant workers. The process is simple; the workers pull the cucumbers off the vine. The harvest season lasts for a month or two, and during that time the same vines are harvested several times. The largest cucumbers are picked first in order to encourage more to grow. Cucumbers which are picked at a smaller size are worth more money because they are better suited to pickling. The migrant workers, therefore, pick the largest cucumbers first, then wait for more to grow and pick them when they reach the appropriate size."

> (b) "Little skill is required in the hand harvest of cucumbers.

"I doubt that it takes a great deal of skill to learn when cucumbers are the proper size to be picked and then pull them off the vines."

(c) "The migrant workers, therefore, control how much money they make solely by the amount and the sizes of cucumbers they pick."

(d) "Once they arrive at Lauritzen Farms, the migrant workers are assigned a house by Lauritzen.

"Lauritzen also assigns each family a section of cucumber vines to harvest.

"The 3.35 corresponds to the minimum wage prescribed by the FLSA, and appears to be a guarantee of the minimum wage during weeks where 50% of gross receipts is insufficient to provide the minimum wage to all workers. The agreement also provides for a work guarantee of 45 hours per 2-week period and identifies the workers as migrant labor contractors instead of employees."

(e) "Workers are paid by the rate of 50% of the purported gross receipts regardless of whether Lauritzen actually sells all of his pickles. So, if a processor declines to purchase certain pickles, the migrant workers are nevertheless paid according to the price list.

"Furthermore, the workers are paid for the cucumbers picked regardless of whether Lauritzen sells them to a processor; thus, they bear little risk of loss."

(f) "During the harvest season, Lauritzen regularly visits his fields. According to most of the mi-

grant workers deposed, Lauritzen has the power to fire them if he chooses.

> "Moreover, workers are supervised, however minimally, by Lauritzen. Lauritzen also holds the power to discharge workers, although apparently this has not been exercised."

> (g) "Once the cucumber harvest begins, however, the cucumbers demand the workers' full attention and workers do not work for other farmers."

> (h) "Without harvest workers, Lauritzen's crops would rot on the vine."

> (1) "The economic realities of this case make the pickers completely dependent upon Lauritzen who plants and cares for the crops, determines the selling price, and provides them with housing. The workers are exposed to little risk, their work requires little skill and almost no investment, and provides little opportunity for profit or gain."

Deponents not having an opportunity to give testimony at trial, respectfully deny and dispute the factual conclusions so reached by the Court as correctly describing the relationship between Lauritzen Farms and the Deponents; that contrary to the factual findings made by the Court, the matters hereafter set forth correctly describe the factual nature of the relationship between Lauritzen Farms and Deponents.

7. That pickles are not "pulled" from vines. To do so would damage the crop. The process of hand harvest is not that of simply waiting for a pickle to grow to appropriate size and then to pull it from the vine. Each Depon-

ent contracts with Lauritzen Farms to conduct the hand harvest of pickles from a specified area of land in exchange for 50% of the sales proceeds derived from the sale of the crop so harvested. The harvested pickles are graded by size with each size having a different sales price. The harvest period can be different for each of the Deponents depending upon their relative skill in maximizing production from the pickle vines. Under the care of skilled and knowledgeable contractors, vines may have 10 to 12 separate pickings while under the care of less able contractors the vines may have as few as 3 to 4 pickings. The number of pickings determines for each Deponent the length of the harvest season and the volume of crop harvested. To develop the skill and knowledge sufficient to maximize yield from the pickle plants generally requires 3 to 4 years of experience and even then many contractors do not maximize yield. Hard work and diligence by the contractor will, of itself, not maximize yields. The number of pickings a vine will yield has little to do with the simple passage of time or the expenditure of hard work. Financial reward depends perhaps 50% on physical labor and diligence and 50% on skill, judgment and knowledge.

8. That the amount of earnings each Deponent receives depends upon a multiplicity of skills and judgments. These include:

(a) The site or area selected for harvest by the contractor: the selection process includes consideration of the character of the soil, review of drainage conditions, evaluation of the evolving plants, and consideration of the contours of the land.

(b) The contractor's skill in maintaining the fields and vines so as to maximize yield: this involves

the process of "rowing" the plants so as to prevent sun damage, facilitate weed control and provide maximum nourishment to the vines.

(c) The number of separate pickings achieved by the contractor: against the price differences for the various sizes of pickles, the contractor must weigh the impact on the vines of permitting the growth of larger size pickles. To illustrate: maximum revenues for each separate picking might be achieved by picking only grades 3, 4 and 5, but a greater number of pickings can be obtained from a vine if only the smaller grades are permitted to grow.

(d) Care in the harvest process: this involves the techniques of proper removal of the pickles from the vines so as to minimize damage to pickle and vine.

(e) Evaluation of what grades, measured against the price of each grade and the yield potential of the vines, will maximize revenues.

9. That Lauritzen Farms and/or Michael Lauritzen do not exercise, even minimally, any supervision or control over Deponents, nor has he the authority or right to do so under the terms of the contractural relationships existing between Lauritzen Farms and each of Deponents. The contractural relationship entered into by each Deponent is for the entire harvest season, as that season is determined by Deponent, and Deponent cannot be "fired" by Lauritzen Farms during such season. If there is dissatisfaction by either party to the contract, the relationship is simply not renewed the next harvest season. Michael Lauritzen comes into the fields but once or twice a week and then only momentarily to turn on irrigation pumps or to check for in-

sects and pests and the need for pesticide applications. Deponents alone determine their hours of work and their methods and techniques of harvest.

10. That Deponents are not paid for the pickles they harvested but which remain unsold. Deponents are not paid for the culls and damaged pickles which they harvest but are unacceptable to and refused by a buyer. When a buyer cannot be found for some portion of the pickles Deponent harvest, no sale results and Deponent and Lauritzen Farms each receive nothing. If weather or insects damage or destroy a portion of the crop, Deponents receive nothing for the crop so lost. Unless a sale in fact results, no payment comes to Deponents for their harvest efforts.

11. That the fields and rows to be harvested by Deponents are not assigned to Deponents by Lauritzen Farms. Each Deponent selects from the available fields and rows those rows in those fields that Deponent wishes to harvest. Lauritzen Farms has no voice in the selection process. Judgmental factors considered in making the selection are soil conditions, contour of the land, drainage conditions, and the quality of the emerging plants.

12. That the housing occupied by Deponent is not unilaterally assigned by Lauritzen Farms. Depending upon what is available and the size of Deponent's family, Deponents negotiate for and selects the housing of their choice. Deponents may elect not to occupy the housing provided by Lauritzen Farms, in which case Deponents can negotiate for a larger percentage of the harvest proceeds.

13. That the pickle crop of Lauritzen Farms will not rot in the fields if unpicked by the Deponents. A machine

harvest of the fields will result and such is the case for those fields not accepted for harvest by independent contractors. The yield is much less from machine harvest but all proceeds go to Lauritzen Farms.

14. That Deponents contract with Lauritzen Farms by choice; that there are many other agricultural employment alternatives available to them at this time of year if they should so wish; that there is a greater demand for their skills than available supply; that they would not journey to Wisconsin to hand harvest pickles if paid by the hour or by piece rate; that a highly skilled and knowledgeable independent contractor can earn for the hours worked, if equated to an hourly rate for each member of his or her family, from $10.00 to $15.00 per hour, while a less skilled contractor for the same physical effort will make $6.00 to $9.00 per hour. To Deponents' knowledge there are no independent contractors at Lauritzen Farms making merely minimum wage or less. All contractors make greatly in excess of minimum wage. Given equal physical effort and given equal years of experience, earnings will still vary greatly among contractors due to differences in skill, knowledge and management ability. If Deponents could not earn a percentage of the sales proceeds, or negotiate the fields and rows to be harvested and the housing they desired, each would go elsewhere for work. During the harvest period approximately 10% of those contracting with Lauritzen Farms perform work elsewhere in addition to performing the harvest at Lauritzen Farms.

15. Deponents have in the past executed "Migrant Labor Worker Agreement/Contracts" with Lauritzen but only because they understand that they are required to do so in order that they might work in Wisconsin. None of the

Deponents feel they are bound by or to such contract or that the terms thereof represents the actual terms of their contractured relationship with Lauritzen Farms.

16. Further Deponents sayeth not.

Jose Antonio Perez
Juan Torres
Fransico Monjaraz
Jose Delgado Jr
Martin Monjaraz
Eleazar Cortez
Jose Contreras
Israel Cepeda
Aurelio Hernandez
Abelino Hernandez Jr.
Ovidio Flones Sr.
Felix S. Rosales Sr.
Jose Rosales Sr.
Epigmenio Trevino Jr.
Luis A. Sanchez
Epigmenio Trevino Sr.

Before me this 13th day of August, 1986, personally appeared each of the above signatories, and under oath each swore and affirmed that the facts set forth above are true of his personal and individual knowledge.

/s/ Linda L. Paster
Notary Public, State of Wisconsin
My commission expires 5-8-88

UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF WISCONSIN

of Labor, United States WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor, Plaintiff, vs. MICHAEL LAURITZEN and MARILYN LAURITZEN, individually and doing business as LAURITZEN FARMS, Defendants.	)	CIVIL ACTION FILE NO. 84-C-0980

Affidavit in Support of Defendant's Motion
For Relief from Judgment

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUSHARA)

The undersigned, Michael Lauritzen, being duly sworn, deposes and says:

1. That Deponent is an adult resident of the State of Wisconsin; that he is a Defendant in these proceedings; that the facts set forth herein are of his personal knowledge and would be admissible at trial of the above cause; that Deponent is competent to testify with respect to such facts if called as a witness so to do. That Deponent makes this affidavit in support of Defendant's Motion for Relief from Judgment heretofore filed in this cause.

2. Deponent incorporates herein the sum and substance of his earlier affidavit filed in this cause and dated September 27, 1985.

3. From among those migrant families contracting with Lauritzen Farms to hand harvest pickles, a number of families do seek and maintain employment with other farmers in the area during the pickle harvest season and while such families are engaged in the harvest of pickles for Lauritzen Farms; that some families will spend 20 to 25% of their time in the employment of other farmers while harvesting pickles for Lauritzen Farms.

4. Housing for migrant families at Lauritzen Farms is not assigned by Lauritzen Farms. Depending upon availability and size of family, each contracting family selects the housing it desires. Upon occasion a contracting family will house itself elsewhere other than at Lauritzen Farms; that if a contracting family does not wish housing with Lauritzen Farms, that wish is respected and a greater percentage of the sales proceeds from the pickle harvest are negotiated to be paid the contracting family.

5. Defendants do not—even minimally—supervise, control or direct the contracting entities in the accomplishment of the hand harvest of pickles. Deponent enters the pickle fields only upon one or two occasions each week during the harvest and then solely for the purpose of checking ground moisture conditions, the activation of irrigation pumps, and inspection for insects and disease and the necessity for pesticide application.

6. Lauritzen Farms has no authority to contractural right to "fire" a contracting family during the pickle harvest season. The terms of the contractural relationship be-

tween Lauritzen Farms and the contracting family exists for the entire period of the harvest. Lauritzen Farms has never claimed or attempted to exercise a right to "fire." If dissatisfaction exists with respect to the performance of a contracting family, Lauritzen Farms sole remedy is not to contract in the future with such family.

7. No independent contractor harvesting pickles for Lauritzen Farms is or has ever been paid for pickles harvested by the contracting family but unsold to a buyer. Culls and damaged crop harvested by a contracting family are eliminated at grading as unsuitable to the buyer and no compensation is paid the contracting family for those pickles eliminated. Upon a number of occasions, Lauritzen Farms has been unable to sell some of the pickles that were harvested and graded and in each instance, since no sales proceeds resulted, no payment was received either by Lauritzen Farms or by the contracting family who made the harvest. Pickle crops lost to weather, pests or whatever cause are pickles for which the contracting family receives no payment. The contractural terms between Lauritzen Farms and the contracting families specify that sales proceeds shall be split 50-50 between Lauritzen Farms and the contracting family and if no sales proceeds result, then no payment is received by the contracting family.

8. Lauritzen Farms does not assign "rows" to a contracting family for purpose of harvest. Each contracting entity selects its own fields and rows from those fields and rows not previously selected by another contracting entity. Upon at least four recent occasions, a migrant family that was not satisfied with the selection of fields and rows available has refused to contract and obtained employment elsewhere.

9. For a number of economic reasons, major ones being to take advantage of specialized skills and to reduce labor costs, Lauritzen Farms has "phased", in whole or part, many of its agricultural operations and contracted their performance to independent contractors. Examples of farming operations so contracted to others, in addition to the pickle harvest, include plowing, crop dusting, trucking, combining, the harvest of the corn, rye, and soybean crops and—through "pick your own"—the harvest of the strawberry crop. Much of the marketing operation for the crops produced by Lauritzen Farms is contracted to others.

10. Both the acreage planted to pickles and the seed varieties utilized are matters unilaterally dictated to Lauritzen Farms by the processor—purchaser. The price to be paid in each year for the several grades of pickles is also a matter not subject to negotiation between Lauritzen Farms and a buyer. The price is unilaterally set by a processor and is the price paid to any and all farmers who wish to sell to the processor.

11. The earnings of a contracting family, although affected by labor expended and years of experience, are not solely determined by effort and experience. Judgments made with respect to field and row selection, husbandry practices with respect to the pickle plants (pickle vines can yield from 3 to 12 pickings depending on the skill in plant management practiced), the relationship between picking practices and circumstances of weather, the manipulation of vines to produce more or less of any certain grade—thus impacting the number of pickings off a vine and total yield—are all judgmental skills and abilities that vary greatly among contracting families. Earn-

ings over a harvest season can and do vary by as much as $3,000.00 to $5,000.00 between families of comparable size, years of experience, and intensity of expended labor effort. Lauritzen Farms entrusts the full and unsupervised responsibility for the harvest of its pickle crop to contracting families only because these families are skilled, experienced and with a capacity for the judgmental skills normally exercised by the farmer—a situation not applicable to the vast majority of those workers engaged in the migrant stream.

12. The pickle crop grown at Lauritzen Farms, if not harvested by contracting families, would not and does not rot in the fields. Each year that portion of the pickle crop not under contract for its harvest is harvested by machine. A machine harvest reduces yield but all sales proceeds go to Lauritzen Farms.

13. The "turn over" between Lauritzen Farms and its contracting families approximates 20% in each year with the average tenure of a contracting family being three to four years.

14. Further Deponent sayeth not.

Sworn and subscribed to this 14 day of August, 1986.

/s/ Michael Lauritzen

Before me personally appeared Michael Lauritzen and under oath swore and affirmed that the facts set forth above are true of the personal and individual knowledge of Michael Lauritzen this 14th day of August, 1986.

Richard J. Kieubaum
Notary Public, State of Wisconsin
My commission expires June 19, 1988

(2)

No. 87-1853

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LAURITZEN ET UX.,
INDIVIDUALLY AND DOING BUSINESS AS
LAURITZEN FARMS, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
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QUESTION PRESENTED

Whether the undisputed material facts concerning petitioners' commercial farming operation establish that the migrant farm laborers who harvest petitioners' annual pickle crop are economically dependent on petitioners and hence are, as a matter of law, employees under the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. IV) 201 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1853

MICHAEL LAURITZEN ET UX.,
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LAURITZEN FARMS, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-37a) is reported at 835 F.2d 1529. The opinions of the district court (Pet. App. 45a-53a, 39a-44a) are reported at 624 F. Supp. 966 and 649 F. Supp. 16.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on December 15, 1987. A petition for rehearing was denied on February 8, 1988 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 9, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Michael and Marilyn Lauritzen and their corporation, Lauritzen Farms, are engaged in a commercial farming operation in Wisconsin (Pet. App. 41a). Among the crops they produce are cucumbers ("pickles") intended for the pickle-processing market (*id.* at 60a). Petitioners plant between 100 and 330 acres of pickles annually, depending on the distribution agreements they execute with various pickle processors at the beginning of each agricultural season (*id.* at 5a, 60a). In relevant part, those agreements establish the selling prices of petitioners' pickles (*id.* at 60a).

Petitioners have sole responsibility for cultivation of their pickle crop. They determine the acreage to be devoted to pickles, prepare the fields, plant the seeds, apply fertilizer, insecticides, and herbicides, and irrigate the crop as necessary (Pet. App. 6a, 46a, 61a). Unlike many other crops, the pickle crop is, of necessity, hand-harvested to maximize yield (*id.* at 60a).[1] To that end, each year petitioners retain 40 or more migrant families to perform the discrete task of harvesting the pickle crop (*id.* at 42a). The families travel to petitioners' farms from throughout the United States and, during the harvest season, live in housing provided, at no charge, by petitioners (*id.* at 5a, 47a). Some of the migrant families have worked for petitioners for six or seven years (*id.* at 47a), with year-to-year turnover averaging 20% and the average tenure of each family being three to four years (*id.* at 80a).

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[1] Routine machine harvesting, though feasible, is not economically practical, as it destroys the vines and is not selective regarding size and grade of pickle (Pet. App. 8a, 80a). As petitioner Michael Lauritzen himself put it, "[p]ickles grown for the process market are, of necessity, hand harvested" (*id.* at 60a).

Each migrant family works on a single plot of land, which, if possible, is assigned in accordance with the family's preference (Pet. App. 7a-62a). The migrant families have exclusive responsibility for harvesting their individual plots and determining which family members will work, the frequency of pickings, and their own working hours (*id.* at 7a, 46a). Petitioners visit the fields once or twice weekly and retain full responsibility for irrigation and application of pesticides, but they do not directly supervise the harvest (*id.* at 8a, 46a, 72a).

The process of harvesting pickles is simple: the pickles are pulled from the vine (Pet. App. 8a, 46a, 56a). Though workers become more proficient with experience, for example, in selecting cucumbers of an appropriate size, the basic task is simple enough that even young children can learn it within a few minutes (*id.* at 8a, 46a). Indeed, young children work in petitioners' fields alongside their parents (*id.* at 5a, 20a).

As they pick the pickles, the laborers place them in pails, which are then emptied into sacks (Pet. App. 7a). The only equipment the laborers supply to harvest the pickles is their work gloves; petitioners supply the pails and sacks (*id.* at 16a, 47a). At the end of each day, a family member transports the sacks, in a truck owned by petitioners, to a sorting or grading facility (also owned by petitioners), receiving, in turn, a receipt that reflects the family's pickle harvest for that day (*id.* at 7a, 16a, 46a-47a).

The migrant families' compensation is based on proceeds from the sales of pickles they harvest (Pet. App. 6a, 48a). The families play no role in determining the selling price of pickles or in selling and/or distributing them (*id.* at 47a). Rather, all matters related to sales and distribution are fixed by the pre-season agreements between petitioners and the processors (Pet. App. 6a, 47a). For several

years, the petitioners have set the families' compensation at one-half of the sales proceeds from pickles they have harvested, with an incremental increase at the season's end for those families that remain to complete the harvest (*id.* at 6a, 48a, 61a). Since pickle prices vary by grade, a family's earnings may depend, in some measure, on the family's proficiency in selecting the pickles to pick (*id.* at 7a-8a).

Some of petitioners' compensation arrangements with migrants are written, though others are oral (Pet. App. 64a). Petitioners and all the migrants, however, have also executed the form "Migrant Work Agreements" required by Wisconsin law (*id.* at 6a, 64a). Those agreements set forth the same pay scale currently used by petitioners, but they also guarantee payment of the minimum wage (*id.* at 6a). The Wisconsin Migrant Law, Wis. Stat. Ann. §§ 103.90-103.97 (West 1988), invalidates private contractual agreements that attempt to convert migrant workers from employees into independent contractors (*id.* at 6a). Petitioners assert that the Migrant Work Agreements do not reflect their actual relationships with their migrant laborers, and they do not consider themselves bound by those agreements (*id.* at 64a-65a; see also *id.* at 74a-75a).

For several years, petitioners have refused to maintain records reflecting hours worked by their migrant laborers and the names and ages or birth dates of migrant family members engaged in harvesting the pickle crop (Pet. App. 42a). They have also refused to guarantee payment of the minimum wage to their migrant laborers (*ibid.*) or to prohibit children under the age of twelve from working in the fields (*id.* at 42a-43a).

2. In 1984, the Secretary of Labor initiated proceedings in district court to enjoin petitioners' alleged minimum wage, child labor, and recordkeeping violations of the Fair Labor Standards Act of 1938 (FLSA), 29

U.S.C. (& Supp. IV) 201 *et seq.* (Pet. App. 4a). After discovery, the Secretary moved for partial summary judgment, arguing that the migrant pickle pickers are petitioners' employees, and thus covered by the FLSA, rather than independent contractors, as petitioners contended (*id.* at 4a, 45a).[2]

The district court agreed with the Secretary that the migrants' employment status could be resolved on summary judgment because the "material facts * * * [we]re largely undisputed," making the workers' employment status "fundamentally a question of law, highly appropriate for a decision on summary judgment" (Pet. App. 45a, 49a). The court then reviewed the undisputed material facts under the multi-factor test for employment status derived from *United States* v. *Silk*, 331 U.S. 704, 716 (1947) (Pet. App. 49a-50a). The court identified six specific factors for consideration but stressed that no factor is dispositive and all "must be weighed * * * to decide the economic realities," with the central consideration being "whether the worker is economically dependent upon the business to whom he renders service" (*id.* at 50a).[3]

Applying the specific criteria to the material facts, the court found, first, that "the workers have little control

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[2] The Secretary's motion was supported by depositions of migrants who had worked for petitioners (Pet. App. 4a). Petitioners opposed the motion, supporting their opposition with an affidavit by petitioner Michael Lauritzen (*id.* at 59a-65a) and one signed collectively by four migrants previously deposed by the Secretary (*id.* at 54a-58a).

[3] The criteria identified by the court were control over work performance; the workers' opportunities for profit or loss depending on exercise of management skills; their investment in equipment; skills required to perform the pickle-picking function; permanence of the working relationship; and whether the service rendered by the migrants is an integral part of petitioners' business (Pet. App. 49a-50a).

over the labor process," since they play no role in determining how "seed is planted, fertilized, irrigated, or dusted"; they are "supervised, however minimally, by" petitioners; and they may be discharged by petitioners (Pet. App. 50a). Determination of their own working hours does not signify control, because "[t]he crop itself fundamentally determines" those hours (*ibid.*). Second, they "have little opportunity for profit or loss" based on managerial skills, because the "return on [their own] labor" is "wages[,] not profit," and "pay[ing] for their own transportation * * * and * * * risk[ing] a bad harvest" are not "investment-related risk[s] * * * related to * * * managerial skills" (*id.* at 50a-51a).

Third, the migrants' only investment "in equipment or material[s]" is "transportation and gloves," while "[e]verything else, from housing to sacks, is provided by" petitioners (Pet. App. 51a). Fourth, "little skill is required" for their jobs since it does not take "a great deal of skill to learn" the basic process of picking pickles, and increased proficiency with greater experience "occurs in almost all jobs" (*ibid.*). Fifth, although "the migrant workers do not have a permanent relationship with" petitioners, "[m]igrant workers are by definition temporary" though "many return [to petitioners' farm] from year to year" (*ibid.*). Finally, "the service rendered by the migrant workers is an integral part of [petitioners'] business" because without them, petitioners' "crops would rot on the vine" (*id.* at 52a).

Weighing all these factors, the court concluded that "[t]he economic realities * * * make the [workers] completely dependent upon" petitioners, who plant and care for the crops, determine the selling price, and provide the workers with housing (Pet. App. 53a). The district court therefore granted the Secretary partial summary judg-

ment, holding that the migrant workers are employees and covered by the FLSA (*ibid.*).[4]

The court subsequently granted the Secretary's motion for summary judgment on all remaining issues and enjoined petitioners from future FLSA violations. The court found that the undisputed facts, taken principally from the deposition of petitioner Michael Lauritzen, established that petitioners had refused to keep records relating to the names, ages, and work hours of their migrant employees; had refused to determine whether young children were working in the fields or to prohibit them from working; and had refused to guarantee payment of the minimum wage to the migrants (Pet. App. 42a-43a). In light of petitioner's further deposition testimony revealing that he did "not intend to comply with the [Fair Labor Standards] Act" in the future (*id.* at 44a), the court found it had "little choice * * * but to enjoin [petitioners] from future violations" (*ibid.*).[5]

3. The court of appeals affirmed. The court first agreed that disposition by summary judgment of the employment status issue was appropriate, noting that "a minor factual dispute does not preclude summary judgment," but rather that the "disputed facts must be 'outcome determinative' " (Pet. App. 10a). Here the migrants'

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[4] The court noted the many decisions holding migrant farm workers to be employees and the contrary result in *Donovan* v. *Brandel*, 736 F.2d 1114 (6th Cir. 1984), which it declined to follow because *Brandel* "disregarded the economic reality of migrant cucumber pickers" (Pet. App. 53a).

[5] The court simultaneously denied petitioners' motion for relief from judgment, which was accompanied by affidavits by Michael Lauritzen and several migrants (Pet. App. 76a-80a, 66a-75a), because it demonstrated no "exceptional circumstances" but was "merely a repetition of arguments previously considered" (*id.* at 40a). The Secretary had earlier dropped the claim for back wages (*id.* at 41a).

affidavits relied on by petitioners had "create[d] no material factual issues" (*id.* at 9a), since they "did not dispute the basic factual background" recounted by the court, but simply "allege[d] in conclusory language" that the relationship with petitioner was " 'that of an independent * * * contractor and not one of an employee' " (*ibid.*). Nor had petitioner Michael Lauritzen's affidavits demonstrated a dispute as to material facts, since "[n]othing in [those] affidavit[s] differs in any substantial way from the trial court's view of the facts" (*ibid.*).

The court of appeals also agreed with the district court's description of the controlling criteria (Pet. App. 11a-12a) and with the court's application of the criteria to the facts (*id.* at 13a-20a). On "control," the court reasoned that petitioners' "pervasive control over the [pickle-farming] operation as a whole" was dispositive, since the "right to control applies to the entire * * * operation, not just the details of harvesting" (*id.* at 15a). As to "profit and loss," the court acknowledged that the migrants' "profit opportunity may depend in part on how good a pickle picker is," but the court relied on the migrants' lack of a corresponding possibility for loss since the migrants "have no investment to lose" and any "reduction in earnings" due to a bad harvest "is a loss of wages, and not of an investment" (*id.* at 16a). Similarly, the workers' "capital investment" was negligible since they provide only their own gloves, which are not "a capital investment," and " '[e]verything else * * * [was] supplied by' " petitioners (*ibid.* (citation omitted)). The relative difference in investment was significant, because the "workers' disproportionately small stake * * * indicat[ed] that their work is not independent of" petitioners (*id.* at 17a).

With respect to the migrants' "skills," the court acknowledged that workers develop "some specialized skill * * * to recognize which pickles to pick when" (Pet. App.

17a). The court observed, however, that "this development of occupational skills is no different from what any good employee in any line of work must do" and does "not change the nature of their employment relationship" (*ibid.*). On "permanency," the court concluded that the seasonal nature of the migrants' employment is insignificant since "seasonal businesses necessarily hire only seasonal employees," and the relationship here "is permanent and exclusive for the duration of * * * [the] season," with many families returning year after year (*id.* at 17a-18a). Finally, the court rejected petitioners' argument that the record was insufficient to establish that the migrants' work was an integral part of petitioners' business. "It does not take much of a record," the court reasoned, "to demonstrate that picking the pickles is a necessary and integral part of the pickle business" (*id.* at 18a).

Turning to the overarching consideration of "economic dependence," the court agreed that "[t]he migrants clearly are dependent on the pickle business, and [petitioners], for their continued employment and livelihood" (Pet. App. 19a). Given the migrants' dependence on petitioners' "land, crops, agricultural expertise, equipment and marketing skills," "they are [petitioners'] employees" (*id.* at 20a).[6]

Judge Easterbrook concurred, agreeing that the migrant workers are employees rather than independent contractors. He reached that result under an approach different from the established multi-factor test used by the majority, which, in his view, "begs questions about which aspects

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[6] Like the district court, the court of appeals specifically declined to follow the reasoning and holding of *Donovan* v. *Brandel, supra*, and noted the many decisions finding migrant laborers to be employees (Pet. App. 13a-14a).

of 'economic reality' matter, and why" (Pet. App. 23a). Judge Easterbrook advocated instead a test that he described as closely linked to the FLSA's "purposes" and "functions" (*id.* at 31a-34a). Judge Easterbrook observed that "[t]here are hard cases under the approach I have limned, but this is not one of them" (*id.* at 36a). He concluded that migrant farm workers, who "sell[] nothing but their labor" (*ibid.*), are employees "without regard to the crop and the contract in each case" (*id.* at 36a-37a).

ARGUMENT

The court of appeals, properly applying the legal principles governing motions for summary judgment, correctly held that the migrant laborers who harvest petitioners' pickle crop are employees under the Fair Labor Standards Act. The court's conclusion is admittedly difficult to reconcile with the conclusion reached by the Sixth Circuit on similar facts in *Donovan* v. *Brandel*, 736 F.2d 1114 (1984), but the court below and the Sixth Circuit are in agreement on the controlling legal principles for determining employment status. Any disagreement between them does not amount to the type of conflict warranting review by this Court. Moreover, the court's decision that there were no material factual disputes precluding summary judgment is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The FLSA was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (29 U.S.C. 202(a)). To further its goal of "lessen[ing], so far as * * * practicable, the distribution * * * of goods produced under subnormal labor conditions" (*Rutherford Food Corp.* v. *McComb*,

331 U.S. 722, 727 (1947)), the Act includes definitions of "employee" ("any individual employed by an employer," 29 U.S.C. (& Supp. IV) 203(e)(1)) and "employ" ("to suffer or permit to work," 29 U.S.C. 203(g)) so expansive that a "broader or more comprehensive coverage of employees * * * would be difficult to frame." *United States* v. *Rosenwasser*, 323 U.S. 360, 362 (1945). Because "broad coverage is essential to accomplish the [FLSA's] goal[s]," the Act has consistently been construed " 'liberally to apply to the furthest reaches consistent with congressional direction.' " *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959)). Nevertheless, independent contractors are not covered because the FLSA "is not so broad as to include those 'who * * * might work for their own advantage on the premises of another.' " *Rutherford Food*, 331 U.S. at 728-729 (quoting *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947)). In contrast, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947); see also *Alamo Found.*, 471 U.S. at 301.

To distinguish between employees and independent contractors, the courts have consistently applied a number of criteria derived from *Silk*, 331 U.S. at 716, and *Rutherford Food*, 331 U.S. at 729—degree of control, opportunity for profit and loss, investment in facilities, permanency of relation, skills required, and interdependence of tasks. See, *e.g.*, *Brock* v. *Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987), cert. denied, No. 87-153 (Nov. 2, 1987); *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-1328 (5th Cir. 1985); *Castillo* v. *Givens*, 704 F.2d 181, 190 (5th Cir.), cert. denied, 464 U.S. 850 (1983); *Donovan* v. *Dial America Marketing, Inc.*, 757

F.2d 1376, 1382 (3d Cir.), cert. denied, 474 U.S. 919 (1985); *Donovan* v. *Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). Determination of employment status, however, "does not depend on * * * isolated factors but rather upon the circumstances of the whole activity" (*Rutherford Food*, 331 U.S. at 730). And, although the question of employment status depends on the individual facts of each case, the ultimate determination of whether a worker is an employee is a question of law. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

2. The court of appeals correctly applied these widely accepted criteria and governing principles in holding, as a matter of law, that the migrant laborers who harvest petitioners' pickle crop are "employees." The undisputed material facts established that petitioners exercise exclusive control over production and distribution of their pickle crop. The migrants play no role in cultivating the fields, planting the seed, irrigating, fertilizing, or applying pesticides; petitioners perform all of those tasks. Similarly, petitioners alone select the processors to whom their pickles are sold and execute pre-season agreements that establish their selling prices. The migrants' only task is to pick the pickles and transport them to petitioners' sorting and grading stations. During the harvest season, the migrants live in housing supplied, free of charge, by petitioners, and they use petitioners' equipment (pails, sacks, trucks) to perform their work. Although their earnings are wholly dependent on the sale of the pickles, the migrants have no say in setting their sales price or selecting the processors to whom they will be sold. In addition, the terms of petitioners' "contracts" with the migrants are set by

petitioners. Petitioners do not negotiate separately with individual migrant families as to basic terms, nor do the terms of the agreements vary from year to year.

Like the employee meat boners in *Rutherford Food*, the migrants essentially do "a specialty job in the production line" (331 U.S. at 730) and their work is "a part of the integrated unit of production" (*id.* at 729). Also like the *Rutherford Food* boners, whose "profits * * * depended upon the efficiency of their work" (*id.* at 730), the pickers' earnings depend in some part on their level of skill in selecting the best size cucumber to pick. They are not self-employed or independent, however, "selling their products * * * for whatever price they can command." *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). Rather, the compensation they receive for the pickles they pick is based on the prices set by petitioners' pre-season agreements with the processors. Their work is therefore "more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (*Rutherford Food*, 331 U.S. at 730).[7]

In sum, in light of the "circumstances of the whole activity" (331 U.S. at 730), it is plain that the migrant pickle pickers are economically dependent on petitioners, and the court of appeals thus correctly held that they are employees entitled to the protections of the FLSA.

3. It is possible that the Seventh Circuit would have reached a different result than that reached by the Sixth

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[7] That petitioners' compensation system may require the migrants to accept some potential risk of lost earnings because of, for example, a poor crop, does not alter the fundamental piecework nature of the system or convert the migrants into independent contractors. See, *e.g.*, *Brock* v. *Mr. W Fireworks*, 814 F.2d at 1050; *Usery* v. *Pilgrim Equip. Co.*, 527 F.2d 1308, 1313 (5th Cir.), cert. denied, 429 U.S. 826 (1976); *Donovan* v. *Sureway Cleaners*, 656 F.2d at 1372.

Circuit in *Donovan* v. *Brandel, supra*, where migrant pickle pickers were held to be employees rather than independent contractors. Nevertheless, it is far from clear that action by this Court is necessary in order to reconcile the two decisions. The two cases are not factually identical.[8] And, as the court below noted, *Brandel* was carefully limited to its facts and, even within its own circuit—at the apparent invitation of the *Brandel* court itself (736 F.2d at 1120 n.11)—has been distinguished in another case involving migrant pickle pickers (Pet. App. 14a, citing *Donovan* v. *Gillmor*, 535 F. Supp. 154 (N.D. Ohio),

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[8] In *Brandel*, the court was impressed with the fact that "[t]he Secretary cites cases which have found other farm laborers to be employees, but none which have presented a finding of lack of a permanent relationship" (736 F.2d at 1117), apparently suggesting that it might well have reached a different result had a greater showing of permanence been made. The court's determination of a lack of permanent relationship, in turn, was based on the facts that only 40-50% of the migrants returned annually and that 24 of a selected 36 families had harvested pickles for only one year (*ibid.*). Those numbers contrast with the comparable statistics admitted by petitioners, *i.e.*, that 80% of the migrants return each year (Pet. App. 80a (20% annual turnover)) and that the average family works three to four years (*ibid.*). In addition, in *Brandel* there was no state-law or contractual obligation to treat the migrants as employees rather than independent contractors, whereas in this case Wisconsin law requires, and petitioners sign, contracts imposing such obligations. Although petitioner Michael Lauritzen claims that he is not bound by those contracts (Pet. App. 64a-65a), we are unaware of any basis on which legal obligations can be so casually cast aside. The vagaries of state law ordinarily will not control the construction of a federal statute, but it would be ironic in the extreme if the migrant farm workers in this case were to be deemed employees under state law yet were held to fall outside the definition of "employee" under a federal statute in which "the term 'employee' ha[s] been given 'the broadest definition that has ever been included in any one act.' " *Rosenwasser*, 323 U.S. at 363 n.3 (quoting 81 Cong. Rec. 7657 (1937) (remarks of Sen. Hugo Black)).

appeal dismissed, 708 F.2d 723 (6th Cir. 1982) (Table), aff'd on reconsideration, No. C79-163 (N.D. Ohio Dec. 2, 1986)).

Furthermore, unlike petitioners (Pet. 25-29), we believe that any disagreement that might persist does not warrant review by this Court. First, as petitioners concede (Pet. 26-28), the Sixth Circuit applied the very same legal principles and specific criteria as the court below. Compare Pet. App. 10a-12a with 736 F.2d at 1116-1117. Thus, the uniformity among the courts of appeals regarding the controlling legal principles (see pp. 11-12, *supra*) remains undisturbed. The type of divergence in result on a narrow issue (the status of migrant pickle pickers) manifested here, especially given the broad consensus on the controlling legal rules, simply does not amount to the type of intolerable conflict that needs resolution by this Court.

Moreover, the *Brandel* result stands alone among the decisions of courts of appeals regarding migrant farm workers. See, *e.g.*, *Beliz* v. *W.H. McLeod & Sons Packing Co.*, *supra*; *Castillo* v. *Givens*, *supra*; *Real* v. *Driscoll Strawberry Associates, Inc.*, *supra*; *Hodgson* v. *Okada*, 472 F.2d 965, 969 (10th Cir. 1973). In our view, it is unlikely that *Brandel* will be followed in other circuits or that it will have any significant effect on the courts' ability to resolve questions of employment status in future migrant workers' litigation under the FLSA. Thus, any conflict that exists is neither sufficiently fixed, nor of sufficient magnitude or impact, to warrant review by this Court at this time.

4. The court of appeals correctly concluded that the district court had properly resolved the employment status of the migrant farm workers on summary judgment. Petitioners' contention to the contrary (Pet. 7-24) is without merit. The court of appeals properly rejected petitioners' assertion, repeated here, that their disagreement with

some of the facts on which the district court relied necessitated a trial. As the court of appeals explained (Pet. App. 10a), the facts petitioners disputed in their various affidavits were not " 'outcome determinative under the governing law' " as is required to preclude summary judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment").[9] Summary judgment cannot be avoided by asserting "the mere existence of *some* alleged factual dispute" (*id.* at 247 (emphasis in original)).

Petitioners' burden was to "come forward with 'specific facts showing there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As the court of appeals held (Pet. App. 8a-9a, 20a), petitioners simply did not carry that burden. Petitioners supported their opposition to the Secretary's motion for summary judgment and their own motion for relief from judgment with two affidavits from petitioner Michael Lauritzen and two signed collectively by several migrant laborers (*id.* at 54a-80a). As the court of appeals noted, these affidavits did not create any disputed *material* facts under the governing law, but in all material respects were in agreement with the facts necessary to dispose of the motion for summary judgment (*id.* at 9a).

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[9] Petitioners argue (Pet. 22-23) that the requirement of demonstrating disputes over "outcome-determinative" facts in order to withstand a summary judgment motion should not apply in cases in which courts must balance several factors, none of which alone is conclusive. Petitioners cite no support for the novel proposition that the mere lack of any single dispositive factor means that a party can require a district court to hold a trial in order to resolve factual disputes that, whatever their resolution at trial, would have no effect on the court's judgment.

In other words, the only purported disputes reflected by the affidavits would not have made a difference under the governing law, even if accepted as true, and hence did not bar an award of summary judgment. For example, the affiants averred that at all times they considered and intended that the migrants were independent contractors, not employees (Pet. App. 55a, 67a). But subjective intent regarding employment status is plainly irrelevant, for "the purposes of the Act require that it be applied even to those who would decline its protections." *Alamo Found.*, 471 U.S. at 302. Indeed, here as in *Alamo Found.*, to allow an exception for workers willing to testify that they worked as independent contractors rather than employees would impermissibly enable employers "to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act" (*ibid.*). Similarly, whether migrants "select" or are "assigned" housing (compare Pet. App. 64a, 73a, with *id.* at 7a, 47a), or "select" or are "assigned" the acreage they harvest (compare *id.* at 55a-56a, 73a, with *id.* at 7a, 48a), is manifestly immaterial to the question whether they are employees under the FLSA, given, among other things, that petitioners owned both the land and the housing and exercised "pervasive control over the operation as a whole" (*id.* at 15a).[10]

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[10] By the same token, even if petitioners are correct that the district court erred in stating that the migrant laborers are paid regardless of whether the pickles are sold (Pet. 15-16), that fact would not alter the result. That fact relates to the "risk of loss" criterion, and the court of appeals correctly recognized that "risk of loss" refers to investment loss, not "reduction in earnings due to a poor pickle crop" (Pet. App. 16a). Moreover, as discussed above, petitioners' compensation system, which imposes a potential risk on the migrants, does not convert the employees into independent contractors. Nor is it significant

Moreover, under the governing law, quibbles about the enhanced proficiency of pickle pickers over time, and their corresponding increased earnings capacity (Pet. 12), do not create any material factual dispute regarding whether the skill required of the migrant laborers is the type of skill customarily associated with the work of independent contractors. However the differing accounts of the migrants' skill level might be resolved, this case remains like *Rutherford Food,* in that the migrants' work (like that of the boners in *Rutherford Food*) is routine. Although their "profits * * * depend upon the efficiency of their work, it [is] more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (331 U.S. at 730). See also *Usery* v. *Pilgrim Equip.*, 527 F.2d at 1314-1315 (skill required of laundry outlet operators is not indicative of nonemployee status because the work, though requiring industry and efficiency, is routine, and employer controls all "major components open to initiative—advertising, pricing, and most importantly the choice of cleaning plants with which to deal"); *Donovan* v. *Sureway Cleaners*, 656 F.2d at 1372 (rejecting argument that the linkage between profits and a worker's initiative and business acumen indicates skills characteristic of an independent contractor when "[n]either long training nor highly developed skills are required" to perform task of

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that, without migrant laborers, the pickles would not "rot on the vine," but would instead be harvested by an inferior method resulting in the recovery of greatly reduced (but not zero) payments to petitioners (Pet. 15; see Pet. App. 73a-74a; 80a). There is no dispute that harvesting the pickle crop is an integral part of petitioners' business, and petitioners themselves acknowledge that "[p]ickles grown for the process market are, of necessity, hand harvested" (Pet. App. 60a). Thus, there is no genuine issue of material fact with respect to whether the migrants' service is an integral part of petitioners' business.

running a laundry outlet and "all major aspects of the business open to initiative * * * are controlled by" the company).[11] Finally, the affiants' bald denials of certain facts or conclusions (*id.* at 65a) plainly do not discharge their burden under the applicable summary judgment standard. See *Anderson*, 477 U.S. at 256 (nonmoving party may not rest on mere denials but must set forth specific facts showing a genuine issue for trial). In sum, petitioners failed to come forward with facts that would produce a different result under the governing law. Thus, summary judgment was properly granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Thus, as Judge Easterbrook correctly observed, "[t]he parties dispute whether 'quickly' [as used to describe the amount of time necessary to learn the pickle picker's occupation] means days or only minutes, but the difference is unimportant for current purposes" (Pet. App. 34a n.5).

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(3)

No. 87-1853

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

MICHAEL LAURITZEN and
MARILYN LAURITZEN, Individually and doing business as LAURITZEN FARMS,

Petitioners,

vs.

ANNE D. MC LAUGHLIN, Secretary of Labor, United States Department of Labor,

Respondent.

On a petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Petitioners come before this Court seeking review of the Seventh Circuit's affirmation[1] of

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[1] Sec'y of Labor, U.S. Dept of Labor v Lauritzen, 835 F2d 1529 (7th Cir 1987).

the District Court's adjudication,[2] by summary judgment, that the relationship between Petitioners and the migrant families who contract to hand harvest Petitioners' pickle crop is one of employment rather than of independent contractor. In their Petition for Certiorari, Petitioners complain that (a) genuine issues of material fact preclude a grant of summary judgment, and (b) the Seventh Circuit misconstrued and misapplied standards promulgated in Rutherford Food Corp v McComb, 331 US 722 (1946), United States v Silk, 331 US 704 (1946), and Goldberg v Whitaker House Corp, 366 US 28, 33 (1960) for ascertaining the presence of an employment relationship within the meaning of the Fair Labor Standards Act of 1938, 29 USC §201, and in so doing created a direct and irreconcilable conflict with the Sixth Circuit decision of Donovan v Brandel, 736 F2d 1114 (6th Cir 1984).

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[2] Brock v Lauritzen, 624 F Supp 966 (E.D. Wis 1985).

Respondents' brief, filed in opposition, details the factual findings recited by the Court of Appeals, and then, in harmony with both lower courts, denies the presence of disputed material facts, contending that such facts as may be in dispute are not outcome determinative in nature.[3] Respondent attempts to distinguish the difference in results between Brandel and the decisions below with the argument that the two cases are not "factually identical." Respondent denies any conflict exists between the Sixth and Seventh Circuits, asserting that each Circuit "applied the very same legal principles and specific criteria."[4]

Petitioners will rest on their Petition with respect to whether summary judgment was granted in the face of disputed material facts. It is primarily to demonstrate the lack of merit in Respondent's contention that the two circuits

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[3]Respondent's Brief, pg. 16.

[4]Respondent's Brief, pg. 15.

applied the same legal standard that Petitioners file their brief in reply.

I. THE DIRECT AND IRRECONCILABLE CONFLICT BETWEEN THE DECISION BELOW AND DONOVAN v BRANDEL, 736 F2d 1114 (6th CIR 1984) NECESSITATES REVIEW AND CLARIFICATION OF THE APPLICABLE STANDARDS FOR ASCERTAINMENT OF AN EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT OF 1938, 29 USC §201 ET SEQ.

Respondent disputes the necessity for review by this Court, contending that (a) factual dissimilarity explains the outcome differences[5] between the decisions below and Brandel and (b) both Circuits, rather than acting in contradiction, "applied the very same principles and specific criteria"[6] of law. Moreover, Respondent suggests that Brandel will be largely ignored and in its isolation will have little, if any, precedential value.

Respondent's perception of factual dissimilarity between the cases, is not shared

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[5]Respondents brief, pg. 14.

[6]Respondent's brief, pg. 15.

by the courts below. The Seventh Circuit specifically noted the factual similarity of the present case with Brandel.[7] We differ, said the Seventh, in that "...we view the factual similarities differently than did the Brandel court."[8] The District Court distinguished Brandel not because of factual dissimilarity but rather because, in the lower court's opinion, the Brandel perception of facts did not accord with the "...economic reality of migrant cucumber pickers."[9]

If there is a factual difference between the instant case and Brandel, it is quantitative only and attributable to the comprehensive trial record made in Brandel[10] -- an opportunity wrongfully denied to Petitioners.

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[7] 835 F2d at 1536.

[8] 835 F2d at 1336.

[9] 624 F Supp at 969.

[10] Brandel, supra at 1118,1120.

Judge Easterbrook, in his concurrence[11] below, expressed the presence of a conflict between the circuits most succinctly:

> ... Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? Donovan v Brandel, 736 F.2d 1114 (6th Cir. 1984), says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors" - each important, none dispositive.

If then, as Judge Easterbrook observes, and as Respondent contends and Petitioners agree, both circuits paid homage to the same legal principles, the same seven "factors," why the necessity for review?

The necessity for review lies with the fact that the Sixth and Seventh Circuits have given wholly different definition to the applicable legal standards promulgated by this Court such that any similarity of application

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[11] 835 F2d at 1539.

exists in name only and not in consequence or results.

This Court has directed that the ultimate question, when considering whether a work relationship is one of employment for purposes of FLSA, is whether, given the circumstances of the whole activity, it is "economically realistic" to view the relationship as one of a dependency upon the business to which services are rendered. United States v Silk, 331 US 704, 713 (1946); Goldberg v Whitaker House Cooperative, 336 US 28, 33 (1961); Rutherford Food Corp v McComb, 331 US 722, 730 (1946); Bartels v Birmingham, 322 US 126, 130 (1946).

To assist courts in resolving this ultimate question, this Court prescribed certain guidelines or evaluation standards, nonexclusive and none by itself controlling. These standards include consideration of the permanency of the relationship, the skill required, the investment in the facilities for work, the opportunity for loss and profit from the

activity involved, the degree of control exercised over the details of the service rendered, the risk undertaken, and the extent of integration of the service rendered into the totality of the business. United States v Silk, supra at 716, 719; Bartels v Birmingham, supra at 130; Rutherford Food Corp v McComb, supra at 729.

Both the Sixth and Seventh Circuit acknowledge these guidelines as their decisional point of departure.[12] The definitions that each Circuit gives to the standards, however, are so unrelated and so divergent as to make wholly fictional any contention that the Circuits use the same scale for weighing a work relation. And it is this difference of definition, Petitioners urge, that warrants, if not compels, the exercise of review and necessitates a revisit to Silk and Rutherford for

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[12] Brandel, supra at 1117; 835 F2d at 1535.

purposes of definitional clarification and instruction in technique of application.

And the differences between the two Circuits in definitional application of the standards is wholesale. To illustrate, Petitioners contrast the treatment given several of the standards by the two Circuits:

The Investment factor:

Supreme Court -
never has been clearly defined

6th Circuit[13] -
capital necessary for the task to be performed by worker

7th Circuit[14] -
capital investment of the worker relative to the capital investment of the whole enterprise

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[13] Brandel, supra at 1118.

[14] 835 F2d at 1537.

The Control factor:

Supreme Court[15] -
degree of employer control over how the "work shall be done"

6th Circuit[16] -
degree of employer control over details of the task

7th Circuit[17] -
degree of employer control of the entire enterprise

The Opportunity for Profit and Loss factor:

Supreme Court[18] -
opportunity to profit from "sound management"

6th Circuit[19] -
opportunity for profit from successful management of the contracted task

7th Circuit[20] -
return on worker's invested capital

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[15] United States v Silk, supra at 714.

[16] Brandel, supra at 1119.

[17] 835 F2d at 1536.

[18] United States v Silk, supra at 719.

[19] Brandel, supra at 1119.

[20] 835 F2d at 1536.

Skill factor:

Supreme Court - undefined

6th Circuit[21] -
workers' skill to be evaluated relative to task involved

7th Circuit[22] -
worker must possess a high degree of specialized skill

The above illustrations point, partially, to the reason why, when given nearly identical fact situations, the two circuits traveled perpendicular paths to a legal result. And they further illustrate why, unless review is had and clarification given, similar factual situations within the two circuits will continue to experience dissimilar results. Without the intervention of this Court, the process pickle industry within the Sixth Circuit will continue to function as one of independent contractor, with the consequences that attend

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[21] Brandel, supra at 1118.

[22] 835 F2d at 1537, 1541.

such relationship, while the same industry, operating in the same mode within the Seventh Circuit is now classified an employment relationship and sustains the different consequences that attend that classification. The appellate Opinion below is a patent and avowed exercise by the Seventh Circuit in a point-by-point disagreement with Brandel as to proper definition of the applicable legal standards.

This Court has recognized the Congressional desire for national uniformity when testing for employment relationships.[23] This Court also appreciates the difficulty of extracting an exact prescription for defining the limits of an employment relationship.[24] And this Court has consistently recognized that it was not the legislative purpose to include within the category of employee all those who may perform service for another or to entirely

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[23] Board v Hearst Publications, 322 US 111, 124 (1943).

[24] United States v Silk, supra at 716.

ignore legal classifications made for other purposes.[25]

Judge Easterbrook, in his concurrence,[26] points out ever so acutely that the standards as defined by the 7th Circuit, if given common application, will lay waste to nearly every independent contractor relationship.

Judge Easterbrook's concurrence does more, however, than merely point the precedential problems of the standards as preached by the majority panel. He raises, in bold relief, the proposition that in the case of migrant agricultural workers, where the capital involved is human capital, as a matter of law there can be no independent contractor relationship, a point inferentially, if not explicitly, also urged by

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[25] United States v Silk, supra at 711-714; Board v Hearst Publications, 322 US 111, 124 (1943); see also Wheeler v Hurd, 825 F2d 257, 275 (10th Cir 1987).

[26] It should be apparent that except as he espoused a per se employee designation for all migrants, and thus concurred in the result below, Judge Easterbrook would have dissented.

Respondent Secretary. The Secretary's territorial push for a per se treatment of the entire migrant agricultural labor force as employees subject to FLSA was recognized in Brandel[27] and there denied as a concept inconsistent with the case-by-case approach mandated by this Court in Rutherford.

The phenomenon of a transitory stream of temporary farm labor flowing out of Texas and Florida, north and west, to plant, raise and harvest agricultural products -- primarily fruits and vegetables -- post dates the decisions of the 1940 that framed the standards in use today to evaluate an employment relationship. The labor market contemplated by Silk and Rutherford did not include the migrant labor force. It was primarily a manufacturing and commercial labor environment that was considered relative to the "mischief to be corrected and

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[27] Brandel, supra at 1120.

the end to be attained" of the FLSA.[28] This Court had no opportunity to reflect whether the standards then enunciated would be appropriate for a labor force constantly in flux, with a distinctive social and cultural heritage that shaped its employment behavior; doing both skilled and unskilled service for a multiple of employers; sometimes staying the season of a single crop, sometimes only the period of a single harvest, sometimes staying the entire agricultural season; sometimes changing employers daily, sometimes weekly, sometimes monthly; sometimes working as individuals but more often working as a family unit. And, a labor force in which families sometimes assumed responsibility for an entire segment of the farming process -- a segment such as in this case the harvest responsibility.

The 6th Circuit recognized the labor peculiarities of the migrant pickle harvesters and

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[28] United States v Silk, supra at 713.

took those peculiarities into consideration when applying the standards to determine the economic reality of the situation before it.[29] The Seventh Circuit majority, however, applied the standards as if dealing with an industrial labor force and consequently, and summarily, relegated all migrants into the coverage under the Act. Judge Easterbrook, alone on the panel, recognized that the standards, as applied below, have little functional relevancy to migrants entrusted with an entire harvest responsibility.

Should this Court refuse to review the decisions below, it jeopardizes, if not wholly disrupts, the traditional industry practice of contracting the entire responsibility of the pickle harvest to skilled migrant families for the economic benefit of all concerned. (Appendix 61a). The instant proceeding, as in Brandel, does not involve employer "mischief" perpetrated on migrant workers contractually

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[29] Brandel, supra, particularly at 1117 and 1119.

unable to fend for their own economic best interests.[30] The Seventh Circuit, as the Sixth, could find no social or economic necessity in the context of the facts before them that, of itself, would warrant inclusion within FLSA. With the courts below, it was merely a matter of the mechanical application of standards so narrowly and technically refined as to emasculate even the pretense of economic reality.

Petitioner respectfully submits that the time is ripe, and the need is urgent, that this Court give a rebirth to the standards by which lower courts are to be guided in the ascertainment of employment relationships under FLSA and statutes of like ilk. The migrant labor force now faces a total disfranchisement from independent contractor relationships and suffers the real prospect of a socially demeaning and

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[30] Both Brandel and the decision below recognize the economic benefits to the migrants involved in the independent contractual relationship. Brandel, supra at 1120; 835 F2d at 1538.

stereotype classification that condemns them forever as menial labor.

> Farm work performed by migrant workers is unskilled labor. There can be no argument to the contrary on this issue.
> Donovan v Gillmor, 535 F Supp 154, 162 (ND Ohio 1982)

Where standards have been misapplied or misappended action toward clarification is appropriate, and, Petitioners believe, imperative. Mobil Oil Corp v FPC, 417 US 283, 310 (1973). Icicle Seafoods, Inc v Worthington, 475 US 709, 716 (1985) Stevens, J. Dissenting; Harris v Pennsylvania R Co, 361 US 15, 28 (1959) Harlan, J. Dissenting

As Judge Easterbrook noted below:[31]

> ...Why keep cucumber farmers in the dark about the legal consequences of their deeds?
>
> People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an

[31] 835 F2d, supra at 1539.

> approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate risk and help people save costs.

A plea from Judge Easterbrook, if not a challenge, for the guidance of certiorari and, Petitioners submit, in the context of these cases:

> ...courts need all the guidance they can get.
>
> Weisel v Singapore Joint Venture, Inc 602 F2d 1183, 1189 (5th Cir 1979).

CONCLUSION

For these additional reasons, Petitioners pray a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit. In the event that the Petition is granted, Petitioners will pray that the judgment of the Court below be reversed and that the cause

remanded for trial in accordance with the instructions of this Court.

Respectfully submitted,

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